IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1924.

No. 739.

D. B. ROBERTSON,
Appellant,

vs.

RAILROAD LABOR BOARD.
Appellee.

BRIEF OF APPELLANT.

STATEMENT.

This case comes before the Supreme Court on two questions of jurisdiction certified to it by the District Court for the Northern District of Illinois, Eastern Division. An appeal was taken after the District Court had denied appellant's motion to quash the service of summons upon him; and thereafter had denied appellant's motion to dismiss the petition of appellee.

The appellee, the Railroad Labor Board, filed a petition (R. 1) on October 1, 1924, praying that an order be entered requiring the respondent, the present appellant, to attend as a witness and testify before said Railroad Labor Board. Appellant is an inhabitant of the Northern District of Ohio (R. 1; 7) and the summons to answer the petition was served upon him in the City of Cleveland

in said Northern District of Ohio by the United States Marshal for that district. (R. 7, 8.) A special appearance was filed in the District Court for the Northern District of Illinois and a motion made to quash the service of the summons. (R. 8.) This motion was denied, (R. 9) and the District Court has certified the *first* question of jurisdiction here involved as follows:

> "First: Whether or not the service of summons should have been quashed, on the ground that the respondent is an inhabitant of the Northern District of Ohio, and that the District Court for the Northern District of Illinois has no jurisdiction to summon the respondent to answer to the petition of the Railroad Labor Board filed in said District Court." (R. 22.)

Following the denial of appellant's motion to quash the service, appellant, having excepted to the order and expressly reserved his rights, moved the court to dismiss the petition. (R. 20.) The court denied this motion and entered a final decree, (R. 21) from which appeal has been taken.

The District Court has certified the *second* question of jurisdiction in the following language:

> "Second: Whether or not the petition of the Railroad Labor Board should have been dismissed, on the ground that the District Court for the Northern District of Illinois has no jurisdiction under the Constitution of the United States and the statutes enacted in conformity therewith, which was invoked by said petition filed in said court, to order the respondent to attend as a witness and testify before said Railroad Labor Board." (R. 23.)

If counsel for appellant are sustained in their *first* contention, that appellant is not subject to the jurisdiction (over *persons*) of the District Court for the District of which he is *not* an inhabitant, and it is held that the service of summons should have been quashed, then this

court is not required to consider, and presumably will not pass upon, their *second* contention, that the petition of the Labor Board invoked a jurisdiction (over *subject-matter*) which the District Court is not authorized to exercise.

In the following brief and argument the point that the District Court had no jurisdiction over the person of the respondent, which counsel for appellant regard as decisive, is presented in Part One. In deference to the opinions of opposing counsel and of the District Court,* counsel also present, in Part Two, a discussion of the second question of jurisdiction certified, that is: Could the District Court take jurisdiction of the subject matter of the petition of the Railroad Labor Board?

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*The opinion of the learned District Judge can be found in the Record, p. 9, ff.

ARGUMENT.[1]

PART ONE.

MOTION TO QUASH SERVICE OF SUMMONS.

The motion to quash the service of the summons upon appellant is based primarily upon the fact that Congress has specifically *prohibited* the District Court from entertaining this civil proceeding against appellant outside the District whereof he is an inhabitant; and secondarily upon the fact that Congress has not authorized the District Court to serve this process outside the Northern District of Illinois.

Section 51 of the Judicial Code, 36 Stat. L. 1101,[2] provides that (except in certain cases, admittedly *not* inclusive of the present proceeding):

> "No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

In view of this absolute prohibition, it will hardly be suggested that a partial repeal or qualification will be construed to have been intended by any other statute, in the absence of clear language expressly showing that legislative intention.

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[1] Italics in quotations are those of counsel unless otherwise noted.

[2] Section 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

It is the contention of counsel for the Railroad Labor Board that the District Court was authorized to disregard the express prohibition of Section 51 by the language of Section 310 of Title III of the Transportation Act, 1920,* the pertinent language reading as follows:

> "In case of failure to comply with any subpoena or in the case of the contumacy of any witness appearing before the Labor Board, the Board may invoke the aid of *any United States district court.* Such court may thereupon order the witness to comply with the requirements of such subpoena or to give evidence touching the matter in question, as the case may be."

Counsel for the Board argue that the permission given to the Railroad Labor Board to invoke the aid of "any United States district court" does not mean (as counsel for appellant contend) the aid of "any court of competent jurisdiction," but means, literally, *any* District

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*Sec. 310. (a) For the efficient administration of the functions vested in the Labor Board by this title, any member thereof may require, by subpoena issued and signed by himself, the attendance of any witness and the production of any book, paper, document, or other evidence from any place in the United States at any designated place of hearing, and the taking of a deposition before any designated person having power to administer oaths. In the case of a deposition the testimony shall be reduced to writing by the person taking the deposition or under his direction, and shall then be subscribed to by the deponent. Any member of the Labor Board may administer oaths and examine any witness. Any witness summoned before the board and any witness whose deposition is taken shall be paid the same fees and mileage as are paid witnesses in the courts of the United States.

(b) In case of failure to comply with any subpoena or in the case of the contumacy of any witness appearing before the Labor Board, the board may invoke the aid of any United States district court. Such court may thereupon order the witness to comply with the requirements of such subpoena, or to give evidence touching the matter in question, as the case may be. Any failure to obey such order may be punished by such court as a contempt thereof.

(c) No person shall be excused from so attending and testifying or deposing, nor from so producing any book, paper, document, or other evidence on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, as to which in obedience to a subpoena and under oath, he may so testify or produce evidence, documentary or otherwise. But no person shall be exempt from prosecution and punishment for perjury committed in so testifying. Stat. L. 472.)

Court. It is therefore the admitted contention of its counsel that the Railroad Labor Board could have filed a petition in a United States District Court in California to compel the attendance before the Board sitting in Chicago of witnesses residing in the State of Maine, and that such witnesses, in order to present legitimate objections to the entry of the order, would have been required to appear in person or by counsel before the District Court of California!

Neither counsel for the Board, nor the learned District Judge who sustained their argument, offered any suggestion as to how a District Court (sitting in California or Illinois) would enforce obedience to its order if a respondent (residing in Maine or Ohio) not only should refuse to obey the summons but also should refuse to obey a subsequent order of the court. There is no provision made anywhere in the statutes for the service of any process of a District Court, in such a proceeding as this, outside the boundaries of the District. The Marshal of the District is given no authority to serve such process outside his own District, nor is the Marshal of another District given authority to serve such process from the originating District.

The opposing contentions in the present case have been summarized at the outset in order that the court may view the authorities hereafter cited and weigh the arguments with an understanding of the simplicity, and also the extraordinary character, of the issue here presented.

Ever since the organization of the Federal District Courts the intention to maintain a territorial limitation upon the jurisdiction of each court, and the desirability of such a limitation, have been clearly evidenced, both in the opinions of the courts and in the laws enacted by Congress.

The general principle of law is that the jurisdiction of a court is available only within the territorial limits of the District for which the court is created. Jurisdiction *in personam* reaches to persons within the district, and jurisdiction *in rem* reaches to property within the district.

> "It is laid down by all publicists and jurists, as an incontestable rule of public law, that one may with impunity disregard the law pronounced by a Magistrate beyond his territory. *Extra territorium jus dicenti impune non paretur,* is the doctrine of the Digest. (Dig. Lib. 2 Tit. 1, L. 20.)" Story: Conflict of Laws, Sec. 8, Chapter I (1834).

If each Federal Court, called a "District" Court, were authorized to send its process and to enforce its orders anywhere throughout the United States, what would be the purpose of organizing "District" Courts?

The leading case wherein the Supreme Court has defined the jurisdiction of the District Courts is *Toland* v. *Sprague,* 12 Peters 300, in which case at page 328 the Court held:

> "The Judiciary Act has divided the United States into judicial districts; within these districts a Circuit Court is required to be holden; the Circuit Court of each district sits within and for that district, and *is bounded by its local limits.* Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, *it can only be exercised within the limits of the district.* Congress might have authorized civil process from any Circuit Court to have run into any State; it has not done so. It has not in terms authorized any original civil process to run into any other district, with the single exception of subpoenas for witnesses, within a limited distance."

The opinion in this case adopted in substance, and partially in expression, the opinion of Mr. Justice Story while on circuit, in *Picquet* v. *Swan,* 5 Mason 35, so that

extended quotation from the opinion in this latter case is appropriate as an exposition of the underlying principles which counsel believe should govern the disposition of the present question.

In *Picquet* v. *Swan*, suit had been brought against Swan, a citizen of the United States, but residing abroad. The question to be decided was whether the Federal Circuit Court had jurisdiction over Swan so that it might render a judgment against him, and the Court stated:

> "It is necessary to ascertain what service would be sufficient to entitle the plaintiff to judgment."

After deciding that the Federal and not the state statutes would govern this question, Mr. Justice Story expressed his opinion as follows:

> "A prior section of the Judiciary Act of 1789 had divided the United States into certain judicial districts, whose limits generally were co-extensive with the territorial limits of a single state. Within these districts a Circuit Court is required to be held at certain times and places prescribed by the Act. The Circuit Court of each district sits within and for the same, and is bounded by its local limits. In the exercise of jurisdiction within those limits the general principles of law must be presumed to apply to them all. Whatever might be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, *that jurisdiction is available only within the limits of the district. The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state.* Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed an usurpation of foreign sovereignty not justified or acknowledged by the law of nations. Even the Court of King's Bench in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland or the Colonies to compel an appearance or justify a judgment against persons residing therein at the time of the com-

mencement of the suit. *This results from the general principle, that a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory.* It matters not whether it be a kingdom, a state, a county or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be ex-territorial; if the latter, then the judicial interpretation is, that *the sovereign has chosen to assign this special limit, short of his general authority.* It was doubtless competent for Congress to have authorized original, as well as final process, to have issued from the Circuit Courts and run into every state in the Union. But it has conferred no such general authority." (Here the learned Justice briefly reviews the legislation then existing.) "This very course of legislation, during a period of almost 40 years, demonstrates the understanding of Congress, as well as of the profession that the process of the Circuit Court could not be served in ordinary cases out of the limits of the judicial district, for which it was established. My brother Washington, in his able judgment in the case *Ex Parte Graham,* 3 Wash. 456, has gone largely into the consideration of this doctrine; and I follow with undoubting confidence the whole course of his reasoning. * * *

"I have already intimated that no sovereignty can extend its process beyond its territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority beyond this limit is a mere nullity and incapable of binding such persons or property in any other tribunals. * * * The principles of the common law (which are never to be lost sight of in the construction of our own statutes) proceed yet farther. In general, it may be said, that they authorize no judgment against a party, until after his appearance in court. He may be taken on a capias and brought into court, or distrained by attachment and other process against his property to compel his appearnce; and for non-appearance be outlawed. But still, even though a subject, and within the Kingdom, the judgment against him can take place only after such appearance, so anxious was the common law to guard the

rights of private persons from judgments obtained without notice, and regular personal appearance in court.

"The conclusion to be deduced from the foregoing considerations, which must necessarily have been in the contemplation of the framers of the judiciary Act of 1789 is, that *the whole structure of that Act proceeded upon the supposition that, independent of some positive provision to the contrary, no judgment could be rendered in the Circuit Court against any person upon whom process could not be personally served within the District.* This was the natural result of the principles of the common law in relation to jurisdiction and process. * * *

"If, therefore, I were called upon to decide this case exclusively upon principles, my judgment would lead me to adopt these conclusions: That by the general provisions of the laws of the United States, the Circuit Courts could issue no process beyond the limits of their districts: that independent of positive legislation, the process can only be served upon persons within the same districts; that the Acts of Congress, adopting the state process, adopt the forms and modes of service only so far as the persons are rightfully within the reach of such process, and do not intend to enlarge the sphere of the jurisdiction of the Circuit Court. * * *"

The court then reached the final conclusion that "there has been no sufficient service of process to compel the appearance of Swan, or authorize a judgment of default against him."

Additional Citations.

On a number of occasions since *Toland* v. *Sprague*, the United States Supreme Court has expressed itself unambiguously on the territorial limitations of Federal Courts.

In *Harkness* v. *Hyde*, 98 U. S. 476, it appeared that a suit had been brought in the District Court for the Territory of Idaho and the summons was served on the

defendant at his place of residence, on an Indian Reservation, outside the limits of the territory; the service was made by the Sheriff (Marshal) of the Federal Territorial Court of Idaho. In the lower courts the defendant raised the jurisdictional objection that he had not been properly served, that service had been made outside the region in which the process of the court had effect. His objection was not sustained in the lower courts and a judgment was had against him. The Supreme Court, with a show of impatience, reversed the judgment of the lower courts, on the ground that the service had "was an unlawful act of the sheriff". The opinion of the court was delivered by Mr. Justice Field, who, after setting out the fact that the place of service was beyond the territorial limits of the Territory of Idaho, stated:

> "The territory reserved, therefore, was as much beyond the jurisdiction, legislative or judicial, of the Government of Idaho, as if it had been set apart within the limits of another country, or a foreign state. Its lines mark the bounds of that government. *The process of one of its courts, consequently, served beyond those lines, could not impose upon the defendant any obligation of obedience, and its disregard could not entail upon him any penalties.* The service was an unlawful act of the Sheriff. The court below should, therefore, have set it aside on its attention being called to the fact that it was made upon the defendant on the reservation. * * *"

This same basis for construction is shown in numerous Supreme Court cases, involving an interpretation of the venue provisions of the Federal Statutes. So in *Ex parte Wisner*, 203 U. S. 449, at 459, it was said by Mr. Chief Justice Fuller:

> "And the object of this Act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge the jurisdiction of the Circuit Court of the United States. *Smith* v. *Lyon*,

133 U. S. 315, 320; *In re Pennsylvania Company*, 137 U. S. 451, 454; *Fiske* v. *Henarie*, 142 U. S. 459, 467."

In the opinion of Mr. Justice Story in *Picquet* v. *Swan*, *supra*, he stated that he followed the opinion of Mr. Justice Washington, delivered while on the Third Circuit, in *Ex parte Graham*, 3 Washington, 456. The petitioner in that case had asked for a Writ of *habeas corpus* and the Federal Marshal for the Third Circuit had answered by setting up a Warrant of Attachment against the petitioner issued under the seal of the Federal Circuit Court for the District of Rhode Island. Mr. Justice Washington held:

> "The question turns upon the authority of the District or Circuit Court of one district to issue its process into any other district, to compel the appearance of a person residing or found within the latter jurisdiction, before the court from which the process issued, or to stand committed, for an alleged contempt of that court.
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> "It is admitted that these courts, in the exercise of their common law and equity jurisdiction, have no authority generally to issue process into another district, except in cases where such authority has been especially bestowed by some law of the United States. The absence of such a power would seem necessarily to result from the organization of the courts of the United States; by which two courts are allotted to each of the districts, into which the United States are divided; the one denominated a District—the other a Circuit Court. This division and appointment of particular courts for each district, necessarily confined the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden. *Were it otherwise, the court of one district could send compulsory process into any other, so as to draw to itself a jurisdiction over persons, or things, without the limits of the district, there would result a clashing of jurisdiction between those courts,* which

could not easily be adjusted; and an oppression upon suitors too intolerable to be endured."

After quoting from the 11th section of the Judiciary Act of 1789, which is now embodied in the Judicial Code, Section 51 (to be discussed later) the court proceeded as follows:

"These provisions appear manifestly to circumscribe the jurisdiction of those courts, as to the person of the defendant, to the limits of the district where the suit is brought. * * *

"It would seem that these provisions were made, not because they were supposed by Congress to be necessary, in consequence of the 11th section of the Judicial Law; but because *the jurisdiction of the courts was essentially confined, by their organization, within the limits of their respective districts.* * * *

"In the exercise of jurisdiction over persons not inhabitants or found within the district where the suit is brought, there are difficulties, which, in the opinion of the court, nothing but an Act of Congress can remove. In what manner, for instance, is the Marshal to dispose of the person? He has no authority to conduct him beyond the limits of his district, nor to deliver him over to the Marshal of an adjoining district, for that purpose. Can he commit him to the gaol of the district where the arrest was made? If he can, the case would present a very extraordinary novelty in jurisdiction—that of a defendant imprisoned in one district, to answer to a suit pending against him in another, how great soever the distance of the one place might be from the other. * * *

"Upon the whole, we are of opinion that the petitioner ought to be discharged."

The principles laid down by this court in *Toland* v. *Sprague,* have since that time been scrupulously followed as a statement of fundamental principles for the various federal district judges. For example, in *Harland* v. *Telephone Company,* 40 Fed. 308 (C. C. D. Conn.), at 312, we find the court, in answer to an argument of coun-

sel urging that the Act of 1887 changed these principles by implication, using this language:

> "It by no means intended to discard the long established doctrine that the defendant must be legally found and served in the District in which he is sued."

In *Palmer* v. *Thompson,* 20 App. D. C. 273, the Court of Appeals of the District of Columbia, held as follows:

> "We may assume that it would not be incompetent for Congress to enact that, as occasion might require, the writs of the Federal courts of any Federal district of the Union might be executed in any other Federal district, and might be directed to the marshal of such other Federal district for execution. *But, in the absence of specific statutory enactment to that effect, it is undoubtedly the general rule of law that no court has authority or jurisdiction beyond the territorial limits of the district for which it has been established,* notwithstanding that it may be, as in the present case, only one of numerous similar courts of the same sovereignty. *No court can by its writ impose a duty upon an officer outside of those limits.* It may well be, that, under exceptional circumstances, it may direct its own officer for some specific purpose to go outside of its own territorial limits; but we cannot understand how it can assume any authority under the general powers vested in it to issue its precept to the officer of another jurisdiction, when it has no power to enforce the performance of the duty."

In *Mitchell* v. *Dexter,* 244 Fed. 926 (C. C. A., First Circuit), an injunction had been issued by the Federal District Court for the Eastern District of Wisconsin, against the defendant, a resident of Massachusetts, and others. The court, after a hearing, found the defendant guilty of a violation of the injunction and ordered an attachment to issue, which was thereupon served on the defendant by the Marshal for the District of Massachusetts. On *habeas corpus* the petitioner was discharged, and the Marshal for the District of Massachusetts ap-

pealed. The Circuit Court of Appeals held that the Federal District Court for the Eastern District of Wisconsin had no authority to order the attachment of the defendant, outside its territorial jurisdiction, and that the judgment of discharge from custody be affirmed. Among other cases the court cited several discussed herein: *Toland* v. *Sprague, Ex Parte Graham, Picquet* v. *Swan, Palmer* v. *Thompson.*

In *Bourke* v. *Amison,* 32 Fed. 710 (C. C. S. D. N. Y.), an action had been brought in the Federal Court of the Southern district of New York against A. B. and C. residing respectively in Illinois, Tennessee and the District of Columbia. The defendants were served at the various places of their residence by the Marshals of those various districts. A motion to quash service was granted because the defendants were served outside New York and the territorial jurisdiction of the Federal Court issuing the summons.

The court held in part as follows:

> "So extensive and extraordinary a grant of power is not to be spelled out from words which are susceptible of reasonable interpretation without being held to effect so radical a change in existing law."

Another illustration of this same principle is embodied in the holding that, although a Federal Marshal may make arrests and carry arms in the execution of his duty *within* his district, even though the carrying of arms is forbidden by the statutes of the state in which his duties lie (*U. S. ex rel.* v. *Fullhart,* 47 Fed. 802), yet this same Marshal is powerless to make arrests or to carry arms *outside* his own district, if the state statute forbids the carrying of arms. (*Walker* v. *Lea,* 47 Fed. 645, See Foster—Federal Practice, Section 427, p. 1347.)

Cely v. *Griffin,* 113 Fed. 981, (D. S. Car. 1902), was decided upon a motion to quash the return and vacate

service of process. A subpoena *ad respondendum* had been issued by the Federal District Court for South Carolina and had been served on the defendants, residents of Pennsylvania, at their homes, by the Marshal for the Western District of Pennsylvania. The court quashed the service and vacated the return, holding:

> "The general rule is that the Circuit Court for each district sits in and for that district, and *the process of the Circuit Court cannot be served without the district in which it is established, without the special authority of law therefor. Toland* v. *Sprague,* 12 Pet. 300."

The following citations contain reaffirmations of the general principles heretofore stated which lie at the very basis of the problem raised by the motion to quash service.

Simkins, Federal Equity Suit (1923), page 310:

> "The service must be made within the district or it is void. United States Revised Stat., 740, 741, 986. It has already been stated that the subpoena has no extra-territorial effect and authorities given. See further to same effect, *Waters* v. *Trust Company,* 126 Fed. 471; *Cely* v. *Griffin,* 113 Fed. 981; *Toland* v. *Sprague,* 12 Pet. 300."

William's Jurisdiction and Practice of Federal Courts, 1917, Section 12 of Chapter 2:

> "The service of process from a Federal Court upon a person in London in a personal action is a nullity. The same is true of such process issued by the courts of one state and served in another. *D'Arcy* v. *Ketchum,* 11 How. 165; *Tiago Railroad* v. *Blossburg,* 20 Wall 137; *Pennoyer* v. *Neff,* 95 U. S. 714; *Davis* v. *Wakelee,* 156 U. S. 680."

In 20 Enc. Pl. and Pr., p. 1111, it is laid down that the Federal Courts cannot send their process into any other district unless by specific authorization by Act of Congress, and cases are cited.

Congress Might Authorize Extension of Jurisdiction of District Courts But Has Not Done So.

To prevent the raising of a false issue it may be stated that notwithstanding the desirability of limiting the jurisdiction of the District Courts within their territorial boundaries, as indicated by the authorities heretofore cited, nevertheless counsel for appellant do *not* contend that Congress *could not* authorize process to run from one District Court into another district.

It was stated, for example, in *Toland* v. *Sprague*, 12 Pet. 300, that:

> "Congress might have authorized civil process from any Circuit Court to have run into any State of the Union; it has not done so. It has not in terms authorized any original civil process to run into any other District; with the single exception of subpoenas for witnesses within a limited distance."

We may assume that Congress might authorize suit to be brought in a District Court against a single defendant who was an inhabitant of another District. Such legislation would violate certain underlying principles of justice, as is indicated by the fact that the Constitution itself expressly forbids a criminal prosecution except with the right of trial "by an impartial jury of the State and District wherein the crime shall have been committed." It is a generally accepted principle of our system of jurisprudence that persons should be subjected to suits only where they reside (or are found) and that defendants should not be summoned far from their homes in order to meet the convenience of plaintiffs, nor should plaintiffs be permitted to make the maintenance of the defense an unduly expensive and burdensome procedure. The fact that these precedents and principles would be

violated by legislation authorizing the summoning of a defendant to appear before the court of another district than that whereof he is an inhabitant does not demonstrate the lack of *power* in Congress to pass such a law, but it does demonstrate that such an *intention* should not be implied or construed except from plain and unmistakable language.

This court has recently held (reaffirming a well-established principle) that the policy of preventing "defendants from being compelled to answer and defend in remote districts against their will" will not be set aside except *by the most explicit statutory language.*

Section 51 of the present Judicial Code, expressly prohibiting a civil suit against a person except in the district whereof he is an inhabitant, was enacted by the first Congress under the Constitution, Judiciary Act of September 24, 1789, c. 20, Sec. 11, 1 Stat. 79. Although other portions of the Judiciary Act have frequently been changed by successive Congresses, *the policy represented by this provision has never been departed from and is still the general law.* Under these circumstances, this court has held that "an intention to depart" from this policy "is not lightly to be assumed."

In *Panama Railroad Company* v. *Johnson,* 264 U. S. 375, this court held, per Mr. Justice Holmes:

> "The case arose under a law of the United States * * * there can be no doubt that the case was within the general jurisdiction conferred on the district courts by par. 24 of the Judicial Code, unless, as the defendant contends, it was excluded by the concluding provision of the act, which says: 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' Although not happily worded, the provision, taken alone, gives

color to the contention. **But, as a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed.** See *United States* v. *Barnes*, 222 U. S. 513, 520. The rule is specially pertinent here. Beginning with the Judiciary Act of September 24, 1789, (1 Stat. at L. 73, chap. 20, Comp. Stat. par. 1051), Congress has pursued the policy of investing the Federal courts—at first the circuit courts, and later the district courts—with a general jurisdiction expressed in terms applicable alike to all of them, and of regulating the venue by separate provisions designating the particular district in which a defendant shall be sued, such as the district of which he is an inhabitant, or in which he has a place of business,—*the purpose of the venue provisions being to prevent defendants from being compelled to answer and defend in remote districts against their will.* This policy was carried into the Judicial Code, and is shown in pars. 24 and 51, one embodying general jurisdictional provisions applicable to rights under subsequent laws as well as laws then existing, and the other containing particular venue provisions. A reading of the provision now before us with those sections, and in the light of the policy carried into them, makes it reasonably certain that the provision is not intended to affect the general jurisdiction of the district courts as defined in par. 24, but only to prescribe the venue for actions brought under the new act of which it is a part."

This position was reaffirmed as recently as December 8, 1924, in a decision rendered in the present term of the Supreme Court, in *Matter of the Petition of East River Towing Company, Inc.*, United States Supreme Court, October Term, 1924, Adv. Op., p. 130. This case involved an interpretation of Section 33 of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988. The question

was whether that Section withdrew the limitation of liability provisions of the Act of March 3, 1851, in the case of personal injury or death of seamen. The court, speaking through Mr. Justice [illegible]imes, held:

> "The short point [illegible]s that the later Act [Act of April 22, 1908, as amended by the Act of April 5, 1910, c. 143, 36 Stat. 291] determines the extent of the seamen's substantive rights and the measure of damages (Panama Railroad Company, 264 U. S. 375; the earlier one [Act of March 3, 1851] from what he shall collect those damages in certain exceptional cases, where those rights have been infringed. * * * No sufficient reason is offered for the extraordinary preference over other claims that would be given to seamen were the decree of the District Court sustained. When a preference in respect of seamen's wages was intended, it was expressed. Act of June 26, 1884, c. 121, Sec. 18, 23 Stat. 57. On the other hand it has been laid down with reference to this same Section 33 that *an intention to depart from the policy deliberately settled in a general statute is not lightly to be assumed. Panama Railroad Company* v. *Johnson*, 264 U. S. 375, 384. See also *Butler* v. *Boston & S. S. S. Company*, 139 U. S. 527."

In *United States* v. *Barnes*, 222 U. S. 513, the question raised was "whether R. S. 3177 (United States Compiled Statutes, 1901, p. 2069) was applicable to the question of enforcement of the specific tax imposed on oleomargarin by the Act of August 2, 1886, c. 840, 24 Stat. at L. 209." It was contended that the said Act impliedly repealed certain portions of R. S. 3177 as to enforcement, because although the Act of August 2nd provided for modes of enforcing the tax imposed therein, it omitted certain modes of enforcement provided in the general statute. The court rejected this contention and said through Mr. Justice Van Devanter, at p. 520:

> "Much of our national legislation is embodied in *codes*, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and

it is the settled rule of decision in this court that *where there is subsequent legislation upon such a subject, it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.*"

And in *United States* v. *Sweet*, 245 U. S. 563, it was held by this court, again speaking through Mr. Justice Van Devanter:

"What has been said demonstrates that the school grant to Utah must be read in the light of the Mining Laws, the School Land Indemnity Law, and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will. *United States* v. *Barnes*, 222 U. S. 513, 520. When it is so read it does not, in our opinion, disclose a purpose to include mineral lands. Although couched in general terms adequate to embrace such lands if there were no statute or settled policy to the contrary, it contains no language which explicitly or clearly withdraws the designated sections, where known to be mineral in character, from the operation of the Mining Laws, or which certainly shows that Congress intended to depart from its long prevailing policy of disposing of mineral lands only under laws specially including them. It therefore must be taken as neither curtailing those laws nor departing from that policy."

Interpreting the words "Any United States district court" as used in Section 310 of the Transportation Act of 1920.

The Labor Board's Interpretation.

The entire case of appellee is based upon the provision in the Transportation Act that, "The Board may invoke the aid of any United States district court."

In order to make these words support the contentions

of appellee they must be construed, not merely as granting an enlarged jurisdiction to every United States District Court to summon any resident of the United States, but they must also be construed as including an enlargement of the power and authority of all United States Marshals outside their respective districts, or of the powers of a United States District Judge over the Marshals of districts other than his own. It would be useless to give the District Courts power to issue orders which could not be enforced; and certainly no such construction of the statute would be justified. Therefore, according to the construction of the statute demanded by counsel for appellee, it must mean that under its terms either the United States Marshal for the Northern District of Illinois has been authorized to proceed into the Northern District of Ohio and there to serve a summons upon the appellant, or else the Marshal of the Northern District of Ohio has been authorized to serve in his district the process issued by the United States District Judge in the Northern District of Illinois.

> "*No mere omission,* no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, *justify any judicial addition* to the language of the statute."
>
> *United States* v. *Goldenberg*, 168 U. S. 103.

Facing the choice of what amendment counsel would engraft upon the law, it was evidently decided to be unwise to attempt to extend the powers of the United States Marshal for the Northern District of Illinois into the State of Ohio. Probably it was thought that in view of the judicial precedents, the Illinois Marshal might be regarded as merely a private citizen in Ohio. On the other hand, the Marshal for the Northern District of Ohio could be regarded as possessed of some authority in that District. Therefore, even though he should serve papers

signed by a Judge having no authority in the Northern District of Ohio, he would be able to carry with him into the office or home of an inhabitant of Cleveland some appearance of being clothed with federal authority. For this reason it appears that a summons was served upon the appellant by the Marshal of the Northern District of Ohio—not a summons which the Marshal had any *authority* to serve, but one which he was nevertheless able physically to deliver.

Let us assume for the moment that the appellant in this case had refused in any way to respond to the summons of the foreign District Court, and that the learned District Judge had entered an order upon him to appear before the Railroad Labor Board, and that he had then refused to obey that order, and that the learned District Judge had then summoned him for contempt, and he had refused to obey that summons, and that then an attachment had been issued which, presumably, again would have been served by the willing Marshal for the Northern District of Ohio, courteously delivering the papers sent to him by the District Judge of another District. At this stage of the proceedings the Marshal in Ohio would be required to exercise force, and we may make the following inquiries in the language of Mr. Justice Washington, whose opinion in *Ex parte Graham,* was quoted *supra:*

> "In what manner, for instance, is the Marshal to dispose of the person? He has no authority to conduct him beyond the limits of his district, nor to deliver him over to the Marshal of an adjoining district for that purpose. Can he commit him to the gaol of the district where the arrest was made? If he can, the case would present a very extraordinary novelty in jurisprudence, that of a defendant imprisoned in one jurisdiction to answer a suit pending against him in another, how great soever the distance one place might be from the other."

We have indulged in this fanciful consideration merely in order to point out what an extraordinary extension of authority and what a considerable amendment of many statutes must be construed into the few words, "any United States district court," in order to support the interpretation of these words which is sought by counsel for the Railroad Labor Board. If these words are so interpreted, they will extend the authority of a Judge of any District Court of the United States to cover the entire nation; they will extend the authority of the Marshal of any District likewise to cover the nation or they extend the authority of a single District Judge over the Marshals of all the other Districts.

A threatening cloud of conflicts of authority arises as counsel uncork this tiny bottle of interpretation.

These considerations make pertinent quotation from two important cases in this court:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequences. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter."
>
> *United States* v. *Kirby*, 7 Wall. 482.

> "It is undoubtedly the duty of the court to ascertain the meaning of the Legislature, from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language, would extend to cases which the Legislature never designed to embrace it."
>
> *Lessee of Brewer* v. *Blougher*, 14 Pet. 178.

The Words "Any Court" Mean "Any Court of Competent Jurisdiction."

About seventy years before the passage of the Transportation Act, Congress passed an act providing for the limitation of liability of vessel owners—the Act of March 3, 1851, 9 Stat. 635, Chapter 43. Two Sections of this Act, to be cited as Revised Statutes Sections 4283 and 4284, read as follows:

> "Sec. 4283 (Liability of owner not to exceed his interest.) The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."
>
> "Sec. 4284. (General average of losses.) Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in **any court**, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

The words "any court" found in the section last quoted (Sec. 4284) have been uniformly interpreted in a series of decisions by this court, and in admiralty rules which have been formulated, to mean "any court of competent jurisdiction." In other words, the statute has

been interpreted, *not* to extend the jurisdiction of a court over persons or things outside its territorial jurisdiction or to enlarge the jurisdiction of any court, but simply to authorize a court *having appropriate jurisdiction,* in this instance having admiralty jurisdiction, to exercise that jurisdiction where it might also have proper jurisdiction of the *res.*

A leading case construing the language above quoted is *Ex parte Slayton,* 105 U. S. 451. That case involved a petition for a writ of prohibition against the District Court for the Northern District of Illinois to prevent that court from entertaining jurisdiction of a proceeding to obtain the benefit of the provisions of Section 4283 above quoted.

The District Court for the Northern District of Illinois was held to be, under general admiralty principles, a court of competent jurisdiction with reference to the vessel and the vessel owners, because "according to those principles, a District Court which has the custody and control of the ship or vessel or some part of it, or its pending freight, has jurisdiction of the libel." (*In re Louisville, etc., Packet Co.,* 223 Fed. 185, 190.)

The opinion of the Supreme Court of the United States reads in part as follows:

> "Section 4284 expressly allows the owner to institute appropriate proceedings in *any court,* that is to say, *any court of competent jurisdiction,* for the purpose of apportioning the sum for which he is liable among the proper parties."

The balance of the opinion of the court is taken up with the determination of the question as to whether the United States District Court for the Northern District of Illinois was a court of competent jurisdiction, and while it was not shown "that the remnants of the wreck scattered on the shores of the lake have actually been

gathered together and brought within the Northern District of Illinois," nevertheless the court found that:

> "The transfer has been made and the freight money paid over. This is not denied. Such being the case, we cannot say the court (upon the showing here made) has not acquired jurisdiction of the thing about which the litigation arises, to wit, the fund to be apportioned among the parties who may be proved to be legally entitled thereto. It has the freight money in its possession and its trustee is in a position to gather up the remnants of the vessel if it has not already done so. The jurisdiction of the court is not dependent at all upon the amount, but on the rightful possession of that which is to be divided."

If this court had interpreted the words "any court" to mean "any United States district court," it is clear the case would have been very quickly disposed of, because the proceeding in question was an admiralty proceeding in a United States District Court. Yet this court found it necessary to determine that this particular United States District Court had jurisdiction according to general admiralty principles.

In *Ex parte Phenix Insurance Company*, 118 U. S. 610, this court again passed upon a petition for a writ of prohibition, which was this time granted, and prohibited the District Court for the District of Wisconsin from acting upon a petition filed under Sections 4283 and 4284 above quoted.

In this case sparks from a steamer set fire to buildings at the mouth of the Fox River, and the damage exceeded the value of the vessel and her freight. The Goodrich Transportation Company, owner of the vessel, sought to limit its liability by invoking the provisions of the Act of March 3, 1851, and the District Court for the District of Wisconsin entertained the petition and denied a motion to dismiss it. But the Supreme Court held that the acts complained of did not constitute maritime torts and

therefore that the lower court as a court of admiralty had no jurisdiction of the subject matter; and held further that the language of the statute permitting the owner to "take the proper proceedings in any court" must be construed to mean "to take proper proceedings in any court of competent jurisdiction," that is, any court having original admiralty jurisdiction of the cause of action."

The court cited the Slayton case and commented thereon as follows:

> "In *Ex parte Slayton*, 105 U. S. 451, the petition for limitation was filed in a district court, by the owner of a vessel which had foundered, to limit his liability for the loss of goods carried, and for damage to another vessel by a prior collision, he not having been first sued. He transferred to a trustee, appointed by the court, his interest in the vessel and in the freight pending. See The Alpena, 10 Biss. 436. This court, being applied to for a writ of prohibition, refused to grant it. It held that the owner of a vessel may, before he is sued, institute appropriate proceedings in a court of competent jurisdiction, to obtain a limitation of liability; that the words 'any court,' in Section 4284 mean, 'any court of competent jurisdiction;' and that, as the transfer had been made and the freight money paid over to the trustee, the district court had jurisdiction to apportion the fund."

In addition to these later cases, reference should be made to earlier constructions by this court of the language of the statute above quoted. The first case involving an interpretation of this language was *Norwich and New York Transportation Co.* v. *Wright*, 13 Wall. 104, where the court held in part as follows:

> "The Act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties, or any of them, may take 'the appropriate proceedings in any court, for the purpose of apportioning the sum for which, etc.' Now, no

court is better adapted than a court of admiralty to administer precisely such relief. It happens every day that the proceeds of a vessel, or other fund, is brought into that court to be distributed amongst those whom it may concern. Claimants are called in by monition to present and substantiate their respective claims; and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State Courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court, undoubtedly, has the power to make all needful rules and regulations for facilitating the course of proceeding."

As was announced in the Norwich Case, the Supreme Court prepared and promulgated a number of so-called "Supplementary Rules of Practice in Admiralty under the Act of March 3, 1851, entitled 'An Act To Limit The Liability Of Ship Owners, And For Other Purposes.'" These rules are a further demonstration that, in the judgment of this court, "any court" means "any court of competent jurisdiction." Rule 54 provided that a libel or petition should be filed "in the proper District Court of the United States as hereinafter specified." Rule 57 provided that the petition should be filed in the District Court in which the vessel might be libelled, or if the vessel be not libelled, then in the District Court in which the owner or owners might be sued. This court therefore again interpreted by the rules promulgated the language "any court" to mean "any court of competent jurisdiction."

Incidentally it might be pointed out that under the Act of August 23, 1842, to be cited as Section 917 Revised Statutes, it is provided that:

> "The Supreme Court shall have the power to prescribe from time to time and *in any manner not inconsistent with any law of the United States* the form of writs * * * etc."

That is, Rule 57 is simply a judicial *definition*, not an alteration, of the term "any court" as it appears in Revised Statutes, Section 4284. The present rule of practice in admiralty, now called Rule 54, is in all essentials the same as Rule 57 as first numbered.

Additional Admiralty Cases.

In *The Enterprise*, 196 Fed. 404, the District Court for the Western District of Pennsylvania found it necessary to determine whether it had jurisdiction to entertain a petition under Revised Statutes, Sec. 4284. In the light of general admiralty principles, the court decided it had no jurisdiction, despite the language permitting the owner to file his petition in "any court."

In the case entitled *In re Louisville and Cincinnati Packet Company*, 223 Fed. 185, the District Court for the Eastern District of Kentucky delivered such a carefully reasoned opinion interpreting the words "any court" to mean "any court of competent jurisdiction," that it seems worthy of extended quotation:

> "Before considering how the matter stands under this rule it should be viewed apart therefrom. Clearly it was not essential that the Supreme Court promulgate any rule on this subject in order for the District Courts to have the right to exercise such jurisdiction. In its absence, at least, such jurisdiction would be distributed in accordance with the general principles of jurisprudence. Such is the case now as to the general jurisdiction in admiralty. There is no

statute or rule promulgated by the Supreme Court distributing it. In the case of *In re Louisville Underwriters,* 134 U. S. 488, it was held that suits in admiralty did not come within the venue or distributing clause of section 1 of the general jurisdictional act of 1887-88 (Act March 3, 1887, c. 373, par. 1, 24 Stat. 552), and that, therefore, a libel in personam can be maintained for any cause within the jurisdiction of a court of admiralty wherever a monition can be served upon the libelee, or an attachment made of any personal property or credit of his. This is in accordance with the general principles of jurisprudence. According thereto a court has jurisdiction to proceed against a person when it has served him with its process within its territorial jurisdiction or against his property when it has so seized it, if it has jurisdiction of the subject matter. For a long time there was no rule distributing the special jurisdiction involved herein. The statute creating it was enacted March 3, 1851, and the rules relating to it were first promulgated May 6, 1872. The fifty-seventh rule as then promulgated did not distribute all cases of such jurisdiction. It was enlarged April 22, 1889, (130 U. S. 705, 9 Sup. Ct. iii), and even as thus enlarged it does not cover all cases thereof. Clearly, then, until the original promulgation in 1872, jurisdiction of this character was distributed in accordance with such principles, and until the enlargement of 1889, insofar as it was not covered by the rule, it was so distributed. It could not otherwise have been exercised. * * *"

"That this statute [R. S. 4283, ff.] creating this special jurisdiction contemplates its distribution in accordance with the general principles of jurisprudence is evident from the fact that section 4284 enacts that the proceeding therein provided for may be taken in 'any court,' and section 4285 that the appointment of the trustee therein provided for shall be by 'any court of competent jurisdiction.' Though not so expressed, the court referred to in section 4284 is any court of competent jurisdiction, and in both instances the court referred to is any admiralty court of competent jurisdiction."

To the same effect are the following cases:

The Mary Lord, 31 Fed. 416.
Elwell v. *Geiber*, 33 Fed. 71.
The Luckenback, 26 Fed. 870.

Construction of Words "Any Court" In Other Statutes.

The words "any court" have been construed in both state and federal courts in connection with other legislation and appear to have been uniformly and necessarily construed to mean, "any court of competent jurisdiction." The first case to be cited provides an exact parallel with the present question.

In *United States ex rel. McIntosh* v. *Crawford*, 47 Fed. 561, the Circuit Court for the Western District of Arkansas was required to construe the provisions of Revised Statutes, Sec. 2103, Act of May 21, 1872, c. 177, 17 Stat. 136. A complaint was filed seeking the recovery of certain monies paid over under a contract with Indians, and the statute provided that all contracts or agreements made in violation of this section should be null and void, and all money or other thing of value paid to any person by any Indian or anyone else for or on his behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, might be recovered by a suit in the name of the United States "in any court of the United States."

The defendant, Crawford, appeared specially and moved to quash the writ of summons on the ground that it appeared on the face of the pleading that Crawford was not an inhabitant of the District, and that summons against him was addressed to the Marshal of the District of Columbia, and that the attempted service of said Marshal upon him in the District of Columbia was not author-

ized, but was in fact prohibited by statute. The opinion of the Circuit Judge who sustained the motion to quash the writ of summons provides such a complete answer to the opinion of the learned District Judge in the present proceeding that it is herewith quoted *in extenso*.

"The effect of the motion of Mr. Crawford, which he files after appearing specially for such purpose, is to ask the court to dismiss the case as to him, because he is not before the court; that he has never, by writ of summons, been lawfully served or brought into court. The complaint alleges that Samuel J. Crawford is a resident of the state of Kansas. The return on the summons of the marshal of the District of Columbia shows that the summons was served on Mr. Crawford in the District of Columbia. This is the only service that has been had upon him. It is claimed by counsel for defendant Crawford that this suit can only be brought against him in the district whereof he is an inhabitant, as the suit is manifestly one where the subject-matter of the jurisdiction arises under a law of the United States; and, as he is not an inhabitant of this district, the suit has not been brought in the proper district. Again, they claim process in a civil suit cannot run out of the district where it is issued, nor can a marshal in a district other than the one where the process is issued make valid service of the same.

"It is claimed by counsel for those who occupy the position of relators or informants that section 2103 of the Revised Statutes of the United States provides that a suit of this kind may be brought 'in any court of the United States', and that it is properly brought against Crawford in this district, although he is not an inhabitant of the same. **By the general law of the United States** providing for jurisdiction over the person, to give such jurisdiction two things must concur—**the suit must be brought at the proper place, and the service of the summons must be made at a place where the officer serving it has authority to execute a writ of summons.** Unless the statute above referred to, providing that actions of this kind may be brought in any court of the United States, changes the rule,

under the law as it now stands, the principle of law declared in *Toland* v. *Sprague,* 12 Pet. 300, is true. That principle is 'That, by the general provisions of the law of the United States, the circuit courts can issue no process beyond the limits of their district'; second, 'that, independently of positive legislation, the process can only be served upon persons within the same district.' The jurisdiction of a circuit or district court of the United States over parties is acquired only by the service of process, or their voluntary appearance. The court has no authority to issue process to another state. *Herndon* v. *Ridgway,* 17 How. 424. I have no doubt that Congress may provide for service of process out of the district, as this is a regulation of practice subject to legislative control. *U. S.* v. *Railroad Company,* 98 U. S. 601. But service of process out of a district where the suit is brought can only be legally made when Congress has by express legislation authorized it. *U. S.* v. *Railroad Co. supra. It requires positive legislation to determine when a person sued may be properly and legally served with process.* Section 1 of the Act of March 3, 1887, among other things, provides as to actions like the present—that is, where jurisdiction rests upon a federal question —'that no civil suits shall be brought before either of said courts against any person, by any original process or proceedings, in any other district than that whereof he is an inhabitant.' The judiciary act of 1789, which was in force at the time of the enactment of section 2103 of the Revised Statutes, required the suit to be brought in the district of which the defendant was an inhabitant, or in which he shall be found at the time of the service of the writ. This was the law as declared by the act of March 3, 1875. *The rule that a person can be sued in any court of the United States,* and required to leave his home, and travel thousands of miles, it may be, to defend the suit, *is an extremely harsh and oppressive one,* and one that may work a great hardship upon the party sued. By such a rule, a resident of the district of Maine may be sued in the district of Washington, and required to go there to defend the suit. This is very oppressive and consequently

a great injustice. In such cases, as was said in *U. S.* v. *Kirby*, 7 Wall 482, 'it will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' Congress might do this, but, in view of the harsh results to follow such a law, there should be positive and express legislation authorizing it. The courts should not hold that it can be done until there is express legislation authorizing it, as there was in *U. S.* v. *Railroad Co., supra.*

"In view of the general law, as it stood at the time of the adoption by Congress of section 2103, I think the reasonable, true, and just construction of the words 'any court of the United States' at the time of their enactment was any circuit or district court where defendant might be found; but since the laws of 1789 and 1875, in regard to the place where suits are to be brought, have been repealed by the laws of 1887 and 1888, which provide, 'No civil suit shall be brought before either of the said courts against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant,' *I think the true and reasonable construction of the words 'any court of the United States' is any court of any district of which the party sued is an inhabitant, and that this must be so until Congress, by express, positive legislation, authorizes service of summons outside the district.* This has not been expressly done by section 2103, or by any other legislation in cases of this kind; therefore, it must be held as to Crawford that he is not in court, and that he cannot be brought into this court unless he becomes an inhabitant of th district, or he voluntarily appears to the merits of the case; that, therefore, the motion to quash the writ of summons issued and served on him in the District of Columbia, must be sustained."

The Supreme Court of Indiana has construed the language of state statutes in providing for proceedings "in any court of this state" to mean necessarily "any court of competent jurisdiction," in two cases now cited.

In *State ex rel. Wildman* v. *Vanderburgh County*, 49 Ind. 457, the opinion of the court may be summarized in the following quotations:

> "By the sections of the statute above set out, the action therein provided for may be brought 'in any court of this State.' If this language is to receive a literal interpretation, it will lead to results that we think were not contemplated by the legislature.
> • • •
> "We do not think the legislature intended any such results, or to work so wide a departure from the general judicial system of the State. We must therefore seek some other than a literal interpretation of the language employed. And we think the legislature, by the phrase 'in any court of this State,' meant nothing more nor less than if they had said 'in any court of this State having competent jurisdiction.' This construction will harmonize with the general law of the State, and carry out what we are justified in concluding was the intention of the legislature.
> "Jurisdiction has reference to parties, as well as subject-matter, and, with the interpretation which we give the statute, the Marion Superior Court had no jurisdiction of the defendant.
> "The judgment below is affirmed, with costs."

In *Mattler* v. *Shaffner*, 53 Ind. 245, the opinion reads in part as follows:

> "*It is a well settled principle, that inferior courts have no jurisdiction, except such as is expressly granted or necessarily implied, and which must be strictly construed. While* v. *Conover*, 5 Blackf. 462; *Mossman* v. *Forrest*, 27 Ind. 233; *English* v. *Smock*, 34 Ind. 115. The law governing the jurisdiction of superior and inferior courts was most happily stated in *Peacock* v. *Bell*, 1 Saund. 73, and approved by this court in *The Board of Commissioners, etc.* v. *Markle*, 46 Ind. 96, in the following words:
> 'That nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an

inferior court, but that which is so expressly alleged.'

"Our criminal courts have been held to be inferior courts, under the constitution, in the same sense as the courts of common pleas are so held. *Clem* v. *The State,* 33 Ind. 418. In the case of *The State, ex rel. Wildman* v. *The Board, etc.,* 49 Ind. 457, this court held the words, 'in any court in this State,' as used in a statute, to mean, 'in any court in this State having jurisdiction.'

"So we must hold the words used in section 777, 2 G. & H. 329, that 'any court of record may suspend an attorney from practising therein for any of the following causes,' to mean that any court of record having jurisdiction may, etc.; and we cannot look to this section to ascertain the jurisdiction of the Marion Criminal Circuit Court, for the later act, which creates it, expressly declares that it 'shall try criminal actions alone.' This prosecution not being a criminal action, it follows that the Marion Criminal Circuit Court had no jurisdiction; and it having no jurisdiction, the proceedings are *coram non judice* and void. *Taylor* v. *Connor,* 7 Ind. 115; *Reams* v. *The State,* 23 Ind. 111; *English* v. *Smock,* 34 Ind. 115."

The Court of Appeals for the District of Columbia has construed similarly the words "any court of the United States" in Section 1042 of the Revised Statutes, Act of June 1, 1872, c. 255, 17 Stat. 198, in the case entitled *United States* v. *Mills,* 11 App. D. of C. 500. In that case the statute provided that a poor person sentenced "by any court of the United States" to pay a fine, and confined solely on the ground of non-payment, could obtain release through application to the Commissioner of the United States Court. It was held that the Police Court of the District of Columbia could not properly be included within this language.

In *People ex rel. McMahon* v. *Board of Excise,* 3 N. Y. S. 253, the City Court of New York held that the words "any court of record" used in the Act conferring

power to issue writs of mandamus against the Board of Excise did not confer such power upon the City Court, although admittedly a court of record. The court construed the language "any court of record" to mean "such courts of record as then had jurisdiction" to issue writs of mandamus in proper cases.

In *State* v. *Turnpike Company,* 65 N. J. L. 73, where the decision turned upon the question as to whether a corporate franchise could be sold under a common law execution, the court held:

> "It is manifest that the language 'by virtue of any process or decree of *any court* in this state' cannot be held to include every court in this state because that would give the power to justice courts and courts of common pleas. Therefore the words cannot be construed in their most comprehensive sense. A narrower meaning must be attributed to the enactment."

In *Griffin* v. *Ranney,* 35 Conn. 239, the court construed a statute applying in terms to "any court" as applying to the Federal courts alone.

In *Borden* v. *Enterprise Transportation Co.,* 198 U. S. 590, a state statute applying in terms to "any court of competent jurisdiction" was held to mean only any *state* court of competent jurisdiction.

Fundamental Principles for Interpretation of Section 310 of the Transportation Act.

The foregoing review of cases shows that at the time of the enactment of the Transportation Act in 1920 not only had the courts generally interpreted the words "any court" to mean "any court of competent jurisdiction," but that particularly the inferior federal courts and the Supreme Court of the United States had for many years interpreted the words "any court", in

the important Act of March 3, 1851, to mean "any court of competent jurisdiction." We may therefore apply to this case the well known rule of statutory construction quoted from *Grover, etc. Co.* v. *Florence, etc. Co.*, 18 Wall. 553:

> "Words and phrases the meaning of which in a statute has been ascertained by judicial interpretation are, when used in a subsequent statute, to be understood in the same sense. Pott Dwarris, 274; Bac. Abr. 'Statute' I; *Pennock* v. *Dialogue*, 2 Pet. 18; *Cathcart* v. *Robinson*, 5 Pet. 280; *McCool* v. *Smith*, 1 Black 469; *Com.* v. *Hartnett*, 3 Gray 450; *Ruckmaboye* v. *Mottichund*, 32 Eng. L. & E. 84; *Bogardus* v. *Trinity Church*, 4 Sandf. Ch. 633; *Rigg* v. *Wilton*, 13 Ill. 15; *Adams* v. *Field*, 21 Vt. 256; such a construction in the case becomes a part of the law, as it is presumed that the Legislature in passing the later law knew what the judicial construction was which had been given to the words of the prior enactment."

It is appropriate also to quote from *Kepner* v. *United States*, 195 U. S. 100, 125:

> "It is a well settled rule of construction that langauge used in a statute which has a settled and well known meaning sanctioned by judicial decisions is presumed to be used in that sense by the legislative body. The Abbotsford, 98 U. S. 440."

To the same effect may be cited the following cases:

The Abbotsford v. *Johnson*, 98 U. S. 440.

United States v. *Mooney*, 116 U. S. 104.

Mason v. *Fearson*, 9 How. 248.

Latimer v. *United States*, 223 U. S. 501.

Yorkshire Insurance Co. v. *Clayton*, (1881), 8 Q. B. D. 421, 426.

Young & Co. v. *Mayor*, (1883), 8 A. C. 517, 526. (Opinion by Lord Blackburn.)

There is another rule of construction which may be invoked because the statutory prohibition against suing a

defendant outside of the district whereof he is an inhabitant has been retained in all essentials through successive statutory changes and amendments since the original Judiciary Act of 1789. Therefore the statement of Chief Justice Marshall in *United States* v. *Fisher*, 2 Cranch. 358, is applicable:

> "Where the general system of the laws is departed from, the legislative intention must be expressed *with irresistible clearness* to induce a court of justice to suppose a design to effect such objects."

It can hardly be suggested that the language of the Transportation Act expresses "with irresistible clearness" an intention of Congress to grant to the Railroad Labor Board the exceptional and wholly unnecessary privilege of bringing suit in any District Court in the United States against a defendant residing in another District.

First. No such power is necessary to uphold the authority of the Railroad Labor Board.

Second. There is no necessity or good reason for subjecting defendants to the burden of making a defense in any part of the United States where the Labor Board, at its whim, may bring suit.

Third. Congress has passed many acts providing expressly for the sending of process outside a District or for the exercise of judicial authority outside the judicial District. Many acts have provided for the use of courts in aid of government tribunals without any territorial extensions of authority, and Congress has been able to express in *unmistakable* language the legislative intention to extend the jurisdiction of the court or the field for service of process, when it has desired to do so.

These bases for construing Section 310 of the Transportation Act will now be discussed in the above order.

I. Railroad Labor Board's Construction of Transportation Act Not Necessary to Uphold the Authority of the Board.

The extension of the powers and jurisdiction of the District Court for the Northern District of Illinois, which is urged by counsel for the Railroad Labor Board, as the necessary construction of the language of the Transportation Act, is not in any way necessary to make the provisions of the Act effective. The Labor Board maintains a central office in Chicago, but under the law it may "whenever it deems it necessary meet at such other place as it may determine." (Sec. 308 (2).)

Any member of the Labor Board may require the attendance of a witness "from any place in the United States at any designated place of hearing and the taking of a deposition before any designated person having the power to administer oaths." Also any member "may administer oaths and examine any witness." (Sec. 310 (a).)

The provision last quoted is followed immediately by the provision of sub-paragraph (b), that, "the Board may invoke the aid of any United States district court."

It is therefore apparent that the Board may take evidence through one member of the Board or by deposition in any part of the United States, or sit as a board anywhere it sees fit within the United States. It is clear that Congress, having in mind the procedure utilized by the Interstate Commerce Commission for years, did not assume that the Board would take all testimony in the City of Chicago regardless of the unjustifiable inconvenience and expense it might cause by such procedure.

In the event of a dispute between a carrier and employes in the State of California, it is fair to interpret the Act as based upon the assumption that evidence

might be taken in the State of California (particularly in one of those minor disputes which might come before the Board where, if the parties were required to present evidence in Chicago, an expense and inconvenience entirely out of proportion to the issue involved would result). Under such circumstances, it might be necessary for the Board to invoke the aid of a District Court in California, and for this reason the board was authorized to apply to "any United States district court."

It is pertinent here to refer to a basis of construction which will be discussed more fully later, and that is the long established procedure under the Interstate Commerce Act. It is worthy of note that in no case which has arisen under the provisions of the Interstate Commerce Act has *the present question* arisen, because the Interstate Commerce Commission has apparently never attempted to proceed against a witness through the federal court of another district than the one whereof he is an inhabitant. The Interstate Commerce Act provides similarly that the Commission may invoke the aid "of any court of the United States" (Section 12), and further provides that "any of the Circuit Courts of the United States *within the jurisdiction of which such inquiry is carried on may* * * * issue an order requiring such common carrier or other person to appear", etc. The office of the Interstate Commerce Commission is in the City of Washington, but a review of the Interstate Commerce Commission cases involving the compulsion of testimony (*infra*), discloses that the Commission has always proceeded against recalcitrant witnesses in the districts whereof they were inhabitants—a precedent which *might* appropriately have guided the Railroad Labor Board.

Interpretation of the Interstate Commerce Act by the Interstate Commerce Commission itself is persuasive of

the *correct* interpretation particularly when an attempt has been made partially to adapt the practice of the Interstate Commerce Commission to the Railroad Labor Board and when the Railroad Labor Board is attempting to sustain its power by the judicial precedents upholding the power of the Interstate Commerce Commission.

In *New York, New Haven and Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361, the opinion of Mr. Justice White is:

> "We concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; at least, until Congress has legislated on the subject. We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

The same principle is found expressed in *Surgett* v. *Lapice*, 8 How. 48, and *United States* v. *Mayes*, 12 Wall. 177.

Disregarding the question as to whether the District Court for the Northern District of Ohio could effectively compel the attendance of the present appellant before the Railroad Labor Board sitting in Chicago, there is at least no question of the authority of the Ohio District Court to compel the appellant to answer to the suit of the Labor Board within the Ohio District (so far as jurisdiction of his *person* is concerned); nor any question of the ability of the Railroad Labor Board to take evi-

dence within that District. It is not necessary in order to sustain the general powers of the Labor Board to uphold its far-reaching and oppressive construction of the Transportation Act.

II. Railroad Labor Board's Interpretation Would Subject Defendants to Unjustifiable Inconvenience and Expense.

This court sustained the power of the Interstate Commerce Commission to compel the giving of testimony, in the case of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, on the express basis that the constitutional rights of a proposed witness were protected, because before an order of the court would be issued against him, he would have the opportunity to have his day in court to be heard in answer to the petition of the Commission, and thus be enabled to protect himself against any order which would violate his constitutional rights or be otherwise improper. But if the construction of the law sought by counsel for the Railroad Labor Board is enforced, then a defendant is left only the shadow, and not the substance, of the right of defense. He would be deprived of liberty and property through a proceeding which would make a mockery of "due process of law."

Simultaneously with the action in the present case, the Labor Board issued subpoenas to witnesses residing in practically all States west of the Mississippi. According to the argument of opposing counsel, no matter how wrongfully or improperly summoned, no matter how clearly void might be the action of the Railroad Labor Board, no matter how unjust and tyrannical its attempted exertion of authority, these proposed witnesses would be required, either to make their defense in a

court sitting a thousand or two thousand miles from their homes, or else subject themselves to a citation for contempt for failing to obey an order issued in the absence of defense.

Notice and *opportunity to be heard* are *the* essentials of "due process of law." A reasonable opportunity to be heard in accordance with the principles of our jurisprudence has always included an opportunity to be heard without unreasonable and oppressive inconvenience and expense. **In the entire history of the United States there has not been established an inferior court of original jurisdiction with authority to summon a sole defendant across the continent to respond to a complaint against him.** Yet counsel for the Railroad Labor Board suggest that such a jurisdiction has been established in every District Court of the United States through the inclusion of the somewhat loose language "any court," in this particular statute. Certainly any such interpretation of an Act of Congress should be avoided if possible. It can hardly be believed that such an interpretation would be *forced into an Act*, despite the precedents against it.

The primary limitation upon the service of process of a District Court is not a *statutory* one, but is derived from the *common law* principle that when a court is established for a particular territory, its process does not run out of that territory. (See, *Picquet* v. *Swan*, *supra*.)

It is claimed that Section 310 authorizes process to run throughout the country; in other words it is claimed that Section 310 changes the common law with respect to the running of the process of the court. In scrutinizing the language of the statute to see if this claim is justified, the court will apply the familiar principle that statutes changing, or statutes in derogation of, the common law are to be strictly construed.

In *Shaw* v. *National Bank of St. Louis*, 101 U. S. 557, the court held:

> "No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."
>
> See also, *Brown* v. *Barry*, 3 Dall. 365, 367.

The following quotation is from Lewis' Sutherland on Statutory Construction, Vol. II, Section 573:

> "Such statutes as take away a common law right, remove or add to common law disabilities, confer privileges or provide for proceedings unknown to the common law, or which are in derogation of the common law, are strictly construed. [Citing numerous cases.] The courts cannot properly give force to them beyond what is expressed by their words, or is necessarily implied from what is expressed. [Citing numerous cases.] Statutes changing the common law are strictly construed, and it is not further abrogated than the language of the statute clearly and necessarily requires. [Citing numerous cases among which are *Johnson* v. *Southern Railway Co.*, 117 Fed. 462; *Fidelity Trust Company* v. *Norfolk Railroad Company*, 90 Fed. 175.]

It is said by Coke, 2 Inst. 200:

> "It is a maxim of the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law."

In *Reg.* v. *Morris* (1867), L. R. I. C. C. R. 90, at 95, Byles, J., said:

> "It is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law."

Counsel will assume that this court will always incline toward a construction which does not involve such a threatened invasion of constitutional rights as does

the construction now proposed by counsel for the Labor Board. (*Harriman* v. *Interstate Commerce Commission*, 211 U. S. 408, quoted *infra*.) This court has often held that it will not adopt a construction which involves constitutional doubts, if another equally obvious construction can be reached.

In *Knights Templars' and Masons' Life Indemnity Company* v. *Jarman*, 187 U. S. 197, it is said at page 205:

> "Were the Act of 1887 more ambiguous than it is as to its application to past transactions, we should still be disposed to apply the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred. Endlich, Interpretation of Statutes, par. 178. This rule was applied by this court in *Granada County* v. *Brogden*, 112 U. S. 261, *sub nom. Granada County* v. *Brown*, 28 L. Ed. 704, 5 Sup. Ct. Rep. 125; *Presser* v. *Illinois*, 116 U. S. 252, 269, and *Hooper* v. *California*, 155 U. S. 648, 657, 5 Inters. Com. Rep. 610."

Likewise it has been held frequently that in construing a statute if there are two views equally possible, the court will take the least *inconvenient*. *Bloomer* v. *McQuewan*, 14 How. 539.

Lord Blackburn, in *Countess of Rothes* v. *Commissioners* (1882), 7 A. C. 694 at 702, said:

> "Where two constructions are open the court may adopt the more reasonable of the two."

Brett, Master of the Rolls, in *Reg.* v. *Overseers of Tonbridge*, 13 Q. B. D. 339 at 342, said:

> "If an enactment is such that by reading it in its ordinary sense, you produce a palpable injustice, whereas by reading it in a sense which it can bear, although not exactly its ordinary sense, it will produce no injustice, then I admit one must always as-

sume that the Legislature intended it should be so read as to produce no injustice."

General words in a statute are always to be restricted to an appropriate application. *"Verba generalia restringuntur ad habilitatem rei vel personam."* Bacon's Maxims, Reg. 10 (VII Spedding 356).

> "In this proviso the Legislature have used language of the widest kind—'in all cases'—so wide that if its full grammatical meaning be given to it the proviso will produce injustice so enormous that the mind of any reasonable man must revolt from it. When the language of the Legislature construed literally involves such consequences, the court has over and over again acted upon the view that the Legislature could not have intended to produce a result which would be palpably unjust, and would revolt the mind of any reasonable man unless they have manifested that intention by express words. The court will not infer such an intention from the use of merely general words. Some limit must, therefore, be put upon the words of the proviso and they must be limited with reference to the subject-matter which is treated of."
>
> Lord Esher M. R. (1889), 23 Q. B. D. 461 at 462, 463.

III. Other Acts of Congress Providing Precedents for Interpretation.

Of course, the object of the court in construing the language of Section 310 is to determine the intention of Congress. (*United States* v. *Freeman*, 3 How. 556; *United States* v. *Fisher*, 2 Cranch. 358; *Jones* v. *Guaranty Co.*, 101 U. S. 626.) To determine this intention, statutes of similar purpose may properly be examined. See *Patterson* v. *Winn*, 11 Wheat. 380; *Ryan* v. *Carter*, 93 U. S. 78, and *Vane* v. *Newcombe*, 132 U. S. 220, where this court quoted the Supreme Court of Indiana, in *Stout* v. *Grant Company*, 107 Ind. 343, 348, as follows:

"In cases of doubt or uncertainty, Acts *in pari materia,* passed either before or after, and whether repealed or still in force, may be referred to in order to discern the intent of the Legislature in the use of particular terms, or in the enactment of particular provisions; and within the reason of the same rule, contemporaneous legislation, not precisely *in pari materia,* may be referred to for the same purpose."

For such consideration as the court may desire to give to them, we present herewith a transcript of the provisions of various federal statutes, indicating by the italicized portions, how carefully Congress has provided for the extension of the authority of a court outside of its District, *when that has been the legislative intention.*

Sherman Anti-Trust Act

Section 5 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209), reads as follows:

"Whenever it shall appear to the court before which any proceeding under Section 4 of this Act [Section 4 invests the "several Circuit Courts of the United States" with the jurisdiction to prevent violations of the Act] may be pending that the ends of justice require that other parties should be brought before the court, *the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the Marshal thereof.*"

Clayton Act

Section 13 of the Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730), reads as follows:

"That in any suit, action or proceeding brought by or on behalf of the United States *subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the anti-trust laws may run into any other district:*

"*Provided*, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown."

The concluding sentence of Section 15 of the Clayton Act reads as follows:

"Whenever it shall appear to the court before which any such proceeding [proceedings to prevent violations of the Act] may be pending that the ends of justice require that other parties should be brought before the court, *the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.*"

(The unreasonableness of an interpretation of Section 310 to authorize a District Court to send its process into another District is demonstrated by the explicit and minute manner which Congress expressed its intention in Section 5 of the Sherman Act and in Sections 13 and 15 of the Clayton Act above quoted.)

Federal Trade Commission Act

The second and third paragraphs of Section 9 of the Federal Trade Commission Act of September 26, 1914, c. 311, 38 Stat. 717, read as follows:

"Such attendance of witnesses * * * may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States *within the jurisdiction of which such inquiry is carried on* may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other per-

son, issue an order requiring such corporation or other person to appear before the commission. * * * to give evidence touching the matter in question; and any failure to obey such an order of the court may be punished by such court as a contempt thereof."

(It will be noted that the Federal Trade Commission Act, while providing that the Commission may invoke the aid of "any court of the United States," then limits the court which may render aid, to a District Court "within the jurisdiction of which such inquiry is carried on." It may be assumed that these provisions would lead the Federal Trade Commission to conduct inquiries where witnesses were available (following the practice of the Interstate Commerce Commission), so that if the federal court were applied to, it would have jurisdiction over the persons against whom orders were sought.

In a previous section of the Federal Trade Commission Act (Section 5), provision is made for enforcement of orders of the Commission by applying to the Circuit Court of Appeals of the United States "within any Circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business." Again it will be noted, the venue is laid in a manner *consistent* with the *customary* jurisdiction of courts.)

District Court Jurisdiction Act

When the Commerce Court was abolished and its jurisdiction transferred to the several District Courts of the United States, the following provision was made in the Act of October 22, 1913, 38 Stat. 219, commonly described as the District Court Jurisdiction Act:

"The procedure in the District Courts in respect

to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. *The orders, writs and processes of the District Courts may in these cases run, be served, and be returnable anywhere in the United States.*"

Copyright Act

The Copyright Act of March 4, 1909, c. 320, 35 Stat. 1084, provides that certain courts shall have power to grant injunctions to prevent infringement of copyright, and further provides:

"*Any injunction* that may be granted restraining and enjoining the doing of anything forbidden by this Act *may be served on the parties against whom such injunction may be granted anywhere in the United States,* and shall be operative throughout the United States and be *enforceable,* by proceedings in contempt or otherwise *by any other court or judge possessing jurisdiction of the defendants.*"

(It will be noted that although it is provided that an injunction may be *served* on parties *anywhere* in the United States, it is *enforceable,* not by proceedings in the original court, but by a court "*possessing jurisdiction of the defendants.*")

Act Concerning Witnesses

The Act of March 2, 1793, c. 22, 1 Stat. 335, R. S. 876, reads as follows:

"*Subpoenas* for witnesses who are required to attend a court of the United States in any district, *may run into any other district*: *Provided,* That in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than 100 miles from the place of holding the same."

(It is noteworthy that until recently the courts them-

selves, in *civil* cases, could not subpoena witnesses residing outside the district to testify in the courts, from a further distance than 100 miles from the place of holding court. The amendment of 1922, Act of September 19, 1923, provides that by special permission of the court a subpoena may be issued for a witness residing more than 100 miles. This provision is evidently experimental as the amendment is made effective only for a period of three years. The *careful* and *tentative* nature of this express provision for compelling the attendance of witnesses *in the court itself* quite clearly indicates that Congress had no intention, in passing the Transportation Act, to extend the jurisdiction of the District Courts, merely in aid of an administrative tribunal—particularly a tribunal which does not determine *legal rights* and obligations. The pertinence of this last comment is made obvious in Part Two of this brief.)

Acts Concerning Writs of Execution

Section 985 of the Revised Statutes, Act of May 20, 1826, c. 124, 4 Stat. 184, reads as follows:

> "All writs of execution upon judgments or decrees obtained in a Circuit or District Court, in any state which is divided into two or more districts, *may run and be executed in any part of such state;* but shall be issued from, and made returnable to, the court wherein the judgment was obtained."

Section 986 of the Revised Statutes, Act of March 3, 1797, c. 20, 1 Stat. 515, reads as follows:

> "All writs of execution upon judgments obtained *for the use of the United States,* in any court thereof, in one state, *may run and be executed in any other state,* or in any territory, but shall be issued from, and made returnable to, the court wherein the judgment was obtained."

(Again attention should be directed to the fact that

even a writ of execution may only be executed within the *one* state—not in *any* district, no matter how remote. A special exception is made, that where the judgment is "for the use of the United States," then the writ may be executed in any other state.)

Act Concerning Union Pacific Railroad Company

The Act of Congress making appropriations for the legislative, executive and judicial expenses of the Government, approved March 3, 1873, contains the following provision in its fourth and last section:

> "The Attorney-General shall cause a suit in equity to be instituted, in the name of the United States, against the Union Pacific Railroad Company, and against all persons who may, in their own names or through any agents, have subscribed for or received capital stock in said road, which stock has not been paid for in full in money, or who may have received, as dividends or otherwise, portions of the capital stock of said road, or the proceeds or avails thereof, or other property of said road, unlawfully and contrary to equity; or who may have received as profits or proceeds of contracts for construction or equipment of said road, or other contracts therewith, moneys or other property which ought, in equity, to belong to said railroad corporation; or who may, under pretense of having complied with the acts to which this is an addition, have wrongfully and unlawfully received from the United States bonds, moneys or lands, which ought, in equity, to be accounted for and paid to said railroad company or to the United States, and to compel payment for said stock, and the collection and payment of such moneys, and the restoration of such property or its value, either to said railroad corporation or to the United States, which ever shall in equity be held entitled thereto. *Said suit may be brought in the circuit court, in any circuit, and all said parties may be made defendants in one suit.* Decrees may be entered and enforced against any one or more parties defendant without awaiting the final determination

of the cause against other parties. The court where said cause is pending may make such orders and decrees, and issue such process as it shall deem necessary to bring in new parties, or the representatives of parties deceased, or to carry into effect the purposes of this act. On filing the bill, *writs of subpoena may be issued by said court against any parties defendant, which writs shall run into any district, and shall be served, as other like process, by the marshal of such district.*" 17 Stat. 508.

(In this instance, in providing for a suit against the Union Pacific Railroad Company, the property of the company being located in many districts and the possible defendants being residents of many districts, a *special provision* was made for a suit "in any circuit," in addition to which it was found necessary to provide specifically that subpoenas might be issued "against any parties defendant" and the writs run "into any district." It will be noted that there is no provision here for subpoenas against *witnesses,* but merely for subpoenas in order to bring in *parties defendant.*)

An Act Regarding National Banking Associations

In connection with proceedings to enjoin the Comptroller of the currency, Section 49, Judicial Code, Act of Mar. 3, 1911, c. 231, 36 Stat. 1100, provides:

"All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had *in the district where such association is located.*"

(Special provision was found necessary in order to permit national banking associations to sue the Comptroller of Currency in the districts where such associations were located.)

Acts Concerning Patent Cases

Section 48, Judicial Code, Act of Mar. 3, 1911, c. 231, 36 Stat. 1100, provides:

> "In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, *in the district of which the defendant is an inhabitant,* or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. *If such suit is brought in a district of which the defendant is not an inhabitant,* but in which such defendant has a regular and established place of business, *service of process, summons, or subpoena upon the defendant may be made by service upon the agent* or agents in conducting such business in the district in which suit is brought."

Section 4906 Revised Statutes, Act of July 8, 1870, c. 230, 16 Stat. 204:

> "*The clerk of any court* of the United States, for any district or territory wherein testimony is to be taken for use in any contested case pending in the Patent Office, *shall,* upon the application of any party thereto, or of his agent or attorney, *issue a subpoena for any witness residing or being within such district or territory,* commanding him to appear and testify before any officer in such district or territory authorized to take depositions and affidavits, at any time and place in the subpoena stated. But no witness shall be required to attend at any place more than forty miles from the place where the subpoena is served upon him."

Acts Concerning Suits for Forfeitures

Section 45, Judicial Code, Act of Mar. 3, 1911, c. 231, 36 Stat. 1100, provides:

> "Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in *any district into which the property so seized is brought* and proceedings instituted. *Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made,* except in cases where it is otherwise provided."

Section 43, Judicial Code, Act of Mar. 3, 1911, c. 231, 36 Stat. 1100, provides:

> "All pecuniary *penalties and forfeitures* may be sued for and recovered either in the *district where they accrue or in the district where the offender is found.*"

Corporation Tax Act

The following is the concluding paragraph of the Corporation Tax Act, 36 Stat. 112, which was part of the Payne-Aldrich Tariff Act of August 5, 1904:

> "Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the *district within which any person summoned* under this section to appear to testify or to produce books, as aforesaid, *shall reside,* to compel such attendance, production of books, and testimony by appropriate process."

Miscellaneous Acts

Many other Acts of Congress might be cited showing the extent to which it has been found necessary to determine explicitly the jurisdiction of the court to be relied upon for the enforcement of the Act.

1. Such Acts would include the Act of February 18,

1922, c. 57, 42 Stat. 388, commonly called the *Capper-Volstead Act*, providing for suit by the Secretary of Agriculture against certain monopolistic associations "in the District Court in the judicial district in which such association has its principal place of business."

2. It is provided in Section 44 of the Judicial Code, Act of Mar. 3, 1911, c. 231, 36 Stat. 1100, in regard to *suits for Internal Revenue taxes*, that they shall be brought "in the District where the liability for such taxes occurs or in the District where the delinquent resides."

3. The *Federal Water Power Commission Act* of June 10, 1920, c. 285, 41 Stat. 1063, Section 4, makes a provision similar to the Transportation Act permitting the Commission to invoke "the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence." According to the construction of the Transportation Act sought by counsel for the Railroad Labor Board, the same generous extension of the authority of the District Courts has been enacted in aid of the Federal Water Power Commission.

4. The Act of March 22, 1919, c. 80, 41 Stat. 300, creating the *Rent Commission* of the District of Columbia, provides by Sec. 105 that the Commission may invoke "the aid of the Supreme Court of the District of Columbia or of any District Court of the United States" to compel the attendance of witnesses. According to the construction contended for by opposing counsel in the present case, the Rent Commission would apparently be authorized to apply to a District Court in Texas to command the attendance of witnesses from the state of New York before the Rent Commission sitting in Washington! The unreasonableness of this contention is shown when the question is asked, "Why give this power to *any* Dis-

trict Court?" If it was intended that subpoenas could be issued out of *any* court, regardless of the residence of the defendants, why should not this entire power have been conferred upon the Supreme Court of the District of Columbia, or let us say upon some one convenient District Court of the United States?

It would seeem obvious that the very reason why the words "any district court" were used was to provide for the bringing of suit in any court *having jurisdiction over the defendant.* It is submitted the same reasoning applies to the language of the Transportation Act. Why should Congress not have given to the District Court for the Northern District of Illinois alone a special jurisdiction, at the request of the Railroad Labor Board, to issue orders all over the United States if it was *intended* to give extra-territorial jurisdiction to any court? Certainly this would have been more reasonable legislation, if such was the intention of Congress, than to confer such a power on every District Court in the United States.

5. The Act of September 22, 1922, c. 412, 42 Stat. 1023, establishing the *United States Coal Commission,* made it a criminal offense for any person to refuse to attend and testify—punishable by fine or imprisonment. In the light of the constitutional limitations upon criminal prosecutions, it is quite clear that proceedings against recalcitrant witnesses could only be taken within the district of their residence. (Constitution of the United States, Article 3, Section 2, Clause 3; and Sixth Amendment.)

The construction of the Transportation Act, for which opposing counsel contend, substitutes the short cut of punishment for contempt for a criminal prosecution, and so eliminates the constitutional protections for the benefit of defendants subjected to ordinary criminal prosecution. Thus it would be doubly oppressive to construe the law

so as to extend the punishing power of a single District Judge over defendants residing anywhere in the United States.

6. The *Spanish Claims Commission Act* of March 2, 1901, c. 800, 31 Stat. 877, provides in Section 4 that the Commission shall be vested "with the same powers now possesed by the Circuit and District Courts of the United States to compel the attendance and testimony of parties, claimants, and witnesses." The Act then provides specifically as follows:

> "That the Marshal of the United States for the District of Columbia or his deputies shall serve the processes issued by said Commission, preserve order in the place of sitting, and execute the orders of said Commission, and *outside of the District of Columbia the writs of said Commission shall be executed by United States Marshals or their deputies in their respective districts.*"

Congress evidently found it necessary in the passage of this law to provide specifically for authority in the United States Marshals to execute the writs issued by the Commission.

7. The *Revenue Act* of September 8, 1916, 39 Stat. 756, provides that:

> "The collector may summon any person residing or found within the State or Territory in which his district lies; and when the person intended to be summoned does not reside and cannot be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned * * *."

Section 20 of the same statute provides:

> "That judisdiction is hereby conferred upon the district courts of the United States for the district within which any person summoned under this title to appear to testify or to produce books shall re-

side, to compel such attendance, production of books, and testimony by appropriate process."

8. Title 7 of the same *Revenue Act* (September 8, 1916) creates and establishes the United States Tariff Commission and provides that the Commission may invoke the aid of any district court of the United States in requiring testimony and that "such court within the jurisdiction of which such inquiry is carried on may * * * issue an order." * * * (39 Stat. 797.)

9. The *Immigration Act* of February 5, 1917, provides for the taking of testimony by a Commissioner or Inspector who "may invoke the aid of any court of the United States," and provides that "any district court within the jurisdiction of which investigations are being conducted by an Immigration Inspector may * * * issue an order." (39 Stat. 886.)

10. The *Grain Futures Act* of September 21, 1922, c. 369, 42 Stat. 998, provides in Section 6(B) that the provisions of Section 12 of the Interstate Commerce Act relating to the attendance and testimony of witnesses shall be applicable in aid of the authority established in that Act.

11. The *Newlands Act* of July 15, 1913, c. 6, 38 Stat. 103, provides in Section 5 that arbitrators may invoke the aid of United States courts to compel witnesses to attend and testify "under the same conditions and penalties as is provided for in the Act to Regulate Commerce."*

*The following Acts are cited as further examples of specific provision made laying the venue in various proceedings:

Act of February 19, 1799, Sections 1 and 2, 1 Stat. 617, laying the venue in criminal and civil actions in Tennessee.

Act of March 3, 1799, Section 17, 1 Stat. 743, 748, specifying the venue of offenses against an Act dealing with trade among the Indians.

Act of March 3, 1849, 9 Stat. 410, providing for venue in civil actions in Iowa.

Act of May 4, 1858, Sections 1 and 2, 11 Stat. 272, providing for venue in transitory actions, when the State comprises more than

Interstate Commerce Act.

The Interstate Commerce Act of Feb. 4, 1887, as amended, provides in Section 12, as follows:

> "And for the purposes of this act the Commission shall have power to require by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and the documents relating to any matter under investigation. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section. And *any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may,* in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

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one district; and the venue in local actions when the land lies in two districts.

Act of June 4, 1880, Section 2, 21 Stat. 155, specifying venue in civil actions in Iowa.

Act of June 14, 1880, 21 Stat. 198, specifying the venue in criminal actions in Texas.

Act of July 5, 1892, Section 4, 27 Stat. 72, 73, specifying the venue in civil actions in Idaho.

Act of July 12, 1894, 28 Stat. 102, specifying the venue in criminal actions in Minnesota.

Act of July 18, 1894, Section 4, 28 Stat., specifying the venue in civil actions in Mississippi.

Act of May 4, 1898, 30 Stat. 397, specifying the venue in cases of removal from the state courts of Texas.

Act of April 12, 1910, 36 Stat. 29, specifying the venue in civil actions in Nebraska.

Act of March 9, 1920, Section 2, 41 Stat. 528, designating the venue of libels in personam against ships owned by the United States Shipping Board.

Act of September 19, 1922, 42 Stat. 849, designating the venue in civil actions brought by the United States.

Counsel for the Railroad Labor Board will necessarily contend that, under the above provision, the Interstate Commerce Commission can apply to any circuit court (or now to any district court), within whose jurisdiction an inquiry is being carried on, for an order to compel the attendance of witnesses from any part of the United States. Yet, in all the years during which this law has been available, the Interstate Commerce Commission has never asked a district court thus to extend its authority outside of the boundaries of the district. It is noteworthy that those cases wherein the power of the Commission to compel testimony, by court order, has been sustained, or denied, have originated in the district court *having jurisdiction over the person of the defendant.*

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447.

Interstate Commerce Commission v. *Baird*, 194 U. S. 25.

Harriman v. *Interstate Commerce Commission*, 211 U. S. 408.

Ellis v. *Interstate Commerce Commission*, 237 U. S. 434.

Smith v. *Interstate Commerce Commission*, 245 U. S. 33.

It should be pointed out that if the Railroad Labor Board's interpretation is to be given to Section 310 of the Transportation Act, that same interpretation applied to Section 12 of the Interstate Commerce Act will extend the jurisdiction of every district court throughout the United States, when its aid is sought by the Interstate Commerce Commission.

That same interpretation will also necessarily be applied to other statutes hereinbefore quoted and possibly to other federal acts which have not been uncovered by counsel. This indicates the danger of a too liberal con-

struction by a court of broad and loose language in a statute and makes highly appropriate a quotation from an opinion of this court in construing Section 12 of the Interstate Commerce Act.

In *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 408, where the court construed Section 12 of the Interstate Commerce Act, the opinion of this court, delivered by Mr. Justice Holmes, reads in part as follows:

> "Before taking up the words of the statute, the enormous scope of the power asserted for the Commission should be emphasized and dwelt upon. * * * *Its territorial sweep also should be noticed.* By Section 12 of the Act of 1887, the Commission has authority to require the attendance of witnesses 'from any place in the United States at any designated place of hearing.' No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times to any commission or court."

The opinion in the Harriman case, which is discussed at length in Part Two of this brief, thereupon proceeded to limit the "enormous scope of the power asserted for the Commission" (as to *subject-matter*) to inquiries concerning "a breach of existing law" and held:

> "If we felt more hesitation than we do [as to the proper interpretation of the provision considered], we still should feel bound to construe the statute, not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts so far as candor permits."

Regardless of any constitutional question in the present case, we submit that "so extensive and extraordinary a grant of power is not to be spelled out from words which are susceptible of reasonable interpretation without being held to affect so radical a change in existing law." (*Bourke* v. *Amison*, 32 Fed. 710.)

Further Principles of Interpretation

The district court in the present case sustained the Labor Board's interpretation of the statute on the stated ground that "the terms of the statute invoked by the petitioner are clear and unambiguous," and cited cases holding that the "natural and usual significance of plain terms is to be adopted as the legislative meaning in the absence of a clear showing that something else was meant." The Supreme Court, however, in the case of *Gompers* v. *United States,* 233 U. S. 604, at page 610, speaking through Mr. Justice Holmes, has held that the task of interpretation is not to be accomplished merely "by taking the words and a dictionary." There are numerous opinions of this court which show that in construing statutory language the literal meaning of words must often be *avoided* rather than followed. For example, in *Murray's Lessee* v. *Baker,* 3 Wheat. 541, the court was asked to give "the natural and usual significance" to the term "beyond seas" in a statute of limitations. The court refused to give a literal interpretation to the words and held that the words "beyond seas" must be held to be equivalent to "without the limits of the state." See also *Oates* v. *First National Bank,* 100 U. S. 239.

The present case calls for appropriate application of the principle laid down by Chief Justice Taney in *Galer* v. *Wilder,* 10 How. 477, at page 496:

> "It is not by detached words and phrases that a statute ought to be expounded. The whole act must be taken together and a fair interpretation given to it, never extending or restricting it beyond the legitimate import of its language and its obvious object."

See also *McKee* v. *United States,* 164 U. S. 287, 293.

Effect of Construction on Other Federal Acts

In concluding this consideration of other federal acts, counsel for appellant venture to call attention to the danger of such an interpretation as that sought by counsel for appellee, in its effect upon present and future legislation. We have sought to gather together the federal acts which might be involved in, or affected by, a construction of words "any court" to mean literally "*any*" court, and not merely, as we contend, "any court of competent jurisdiction." It is probable, however, that out of the multiplicity of statutes, our collection is not complete. It is also probable that in the passage of future legislation Congress may utilize again such language as "any court", without a realization of the expansive interpretation of the words which may be sought. We submit that the qualification which we believe to be implied in the present use of the words "any court" ought to be *consistently* implied, that **it should not be assumed that a legislative body intends to enlarge the jurisdiction of a court over persons and property except by the passage of an act expressly providing for an enlargement of jurisdiction.** We submit that where in legislation provision is made for the invocation of judicial powers of "any court" there must be implied in the words the thought of a court appropriate for the purpose and a court to which the necessary jurisdiction has been *specifically* granted.

Finally, we submit that general language will not suffice for such a radical amendment of the federal law as the enlargement of the jurisdiction of a district court so that its authority may be extended and its process served outside the territorial limits of the district; that not only must such an intention be clearly stated in the language utilized to enlarge the jurisdiction of the court,

but also there must be *additional legislation* making that language effective, either by granting extra-territorial authority to the Marshal of the district, or else authority to Marshals outside the district to execute extra-territorial process. It is submitted that the absence of such additional legislation clearly indicates the absence of any intention on the part of Congress to extend the authority of the district courts in accordance with the contentions of counsel for the Railroad Labor Board.

It is appropriate to conclude this argument with a quotation from the opinion of a federal court construing the Interstate Commerce Act to determine whether jurisdiction over a defendant had been obtained through service outside the District in which suit had been brought:

> "It is, of course, within the power of Congress to provide that process from a federal court may run and be served anywhere in the United States. Such jurisdiction, being of exceptional character, ought not to be assumed by a court without clear statutory authority therefor. *So far as I am aware, in every case in which the process of a District Court runs beyond its own district, there is explicit provision to that effect, which is lacking in the section under discussion." Graustein* v. *Rutland Railroad Company,* 256 Fed. 409.

Conclusion of Part One.

We submit in conclusion our apology to the court for the length of presentation of what we regard as a simple point of law, as to which our position is amply fortified by precedents. Yet in view of the fact that we are opposed by a Government tribunal, represented by Assistants to the Attorney General and a United States District Attorney, and in view of the fact that a District Court of the United States has sustained the opposing contentions, perhaps we may be pardoned for feeling it

necessary to present such an extended argument in behalf of appellant.

We ask the further indulgence of the court for the presentation of Part Two of this brief. In our opinion, consideration of the *second* question of jurisdiction is entirely unnecessary in this case. In the absence of jurisdiction over the *person* of the defendant, which question lies at the threshold of the proceeding, it is clear that we should not be required to discuss the question of lack of jurisdiction of the court over the *subject-matter*. But in deference to the official standing of opposing counsel and to the opinion of the District Court, we cannot assume the responsibility for not considering this question, which will be presented in Part Two of this Brief.

PART TWO.

MOTION TO DISMISS PETITION.

The motion of appellant to dismiss the petition of the Railroad Labor Board is based upon the following propositions:

I.

The petition prays for an order to compel respondent (appellant) to appear and testify before the Labor Board, which would deprive him of liberty and property without due process of law, in violation of the Fifth Amendment, because:

(a) "The power to require testimony is limited * * * to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law." (*Harriman* v. *Interstate Commerce Commission,* 211 U. S. 408.)

(b) The Railroad Labor Board does not determine, enforce, or protect *legal* rights and obligations. (*Pennsylvania Railroad Company* v. *Railroad Labor Board,* 261 U. S. 72.)

(c) It is admitted in the present case, that testimony is not sought for the purpose of determining legal rights and obligations. Therefore to deprive a witness of freedom of action and to require him to spend time and money, merely to aid a group of investigators to formulate an opinion, would deprive the witness of liberty and property without due process of law.

II.

The petition did not invoke the exercise of "judicial power" to determine a "case" or "controversy" within the jurisdiction of the federal courts under Article III of the Constitution.

(a) Judicial power "determines what the law is, and what the *rights* of the parties are with reference to transactions already had." (*Sinking Fund Cases*, 99 U. S. 700, 761.)

(b) "That power is capable of acting only when the subject is submitted to it by a party who asserts his *rights* in the form prescribed by law." (*Osborn* v. *Bank of United States*, 9 Wheat. 738, 819.)

(c) The petition did not invoke any *judicial power* of the district court to aid in the "adjudication by regular proceedings established for the protection or enforcement of rights or the prevention, redress or punishment of wrongs" [by the Labor Board]; and therefore did not present a "case" or "controversy" to which the "judicial power" extends. (*Smith* v. *Adams*, 130 U. S. 173.)

III.

The petition sought the aid of the judicial department in the formulation of a public policy, a matter wholly within the functions of the legislative or executive departments, in which the judicial department will not interfere. (*Luther* v. *Borden*, 7 How. 1.)

I.

THE ORDER PRAYED WOULD DEPRIVE APPELLANT OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

Conditions Under Which Testimony May Be Compelled.

The power of the courts to require testimony in judicial proceedings is so well recognized that except where there have been complaints of "unreasonable searches and seizures," a constitutional question has been seldom raised. However, within the last fifty years the use of administrative commissions authorized to seek the aid of the courts in obtaining evidence has so developed that in a few recent cases it has become necessary to re-examine the bases of this judicial power.

Admittedly, a person compelled to attend upon a court (or commission) to give testimony is deprived of liberty and property. His freedom of action is restrained; he is unable to devote himself to his customary labors; his power to earn a livelihood is temporarily impaired; he may be required—to prevent either humiliation or actual loss of property—to prepare himself to give evidence; and he is required certainly to make a sacrifice of privacy. But it has been long established that when testimony is compelled by the exercise of *judicial power*, the resultant deprivation of liberty and property proceeds *with* due process of law. It has been held also that the witness is performing a "public duty"; and that the question of a deprivation does not really arise. This is a rhetorical evasion of the "deprivation" question rather than a true answer.

It must be apparent, however, that the basis for this "public duty" lies in a corresponding public benefit.

This public benefit is found in upholding the administration of justice in maintaining *legal* rights and enforcing *legal* obligations. It is the proper and sole function of the courts to determine, to enforce, and to protect legal rights. It is a necessary use of the judicial power vested in the courts to compel the production of evidence required in judicial proceedings.

When the courts are compelling the production of evidence in the course of *judicial* proceedings, the fundamental propriety of the exercise of *judicial* power is clear. But when the *judicial* power is invoked to compel the production of evidence as an aid to the exercise of *legislative* or *executive* power, the questions at once arise: (1) Is the court enforcing a duty imposed by law upon every citizen, or is the court in fact depriving a citizen unjustifiably of liberty and property without due process of law? (2) Is the court exerting "judicial power" for the determination of *legal* rights and obligations, or is the court in fact exerting judicial *force*, unsupported by the authority of judicial *power*.

In several comparatively recent cases, these questions have been pressed upon this court, and it is the contention of counsel for the appellant that **this court has consistently maintained that the judical power to require testimony cannot be exerted in aid of such proceedings as those before the Railroad Labor Board, wherein legal rights and obligations are not determined, enforced, or protected.** The present case is, however, apparently one of first impression as to the construction of the Transportation Act and the power of the Railroad Labor Board to require testimony. The decision will provide a precedent of grave importance for existing administrative tribunals and seriously affect future legislation. Therefore we deem it appropriate to present a re-examination of the bases for the exercise of judicial power

in requiring testimony, in order to demonstrate clearly that, up to the present time, this court has refused to sanction any such use or extension of judicial power, as would be required to uphold the order of the District Court.

We will ask the court to consider: (1) the nature and extent of the duty to testify in a court; (2) the nature and the extent of the duty to testify before legislative bodies; and (3) the nature and extent of any duty to testify before administrative tribunals.

We believe the result of this consideration will be the demonstration that there is *no precedent* for the order of the District Court in the present proceeding, but that there is an unbroken line of judicial authority supporting our contention that such an order is an unauthorized extension of judicial power in violation of the constitutional rights of the appellant.

(1) The Duty to Appear as a Witness and Testify in a Court.

Every member of society is subject to a duty to appear in a court of law, upon being properly served with appropriate process, there to testify as to any matters within his knowledge. As to the existence of this general duty, there can be no dispute. *Blair* v. *United States*, 250 U. S. 273; *Williams* v. *State*, 125 Ark. 285; *Ex parte Cohen*, 104 Cal. 524; *Lathrop* v. *Clapp*, 40 N. Y. 328; *In the matter of Davies*, 168 N. Y. 89; *Ex parte Barnes*, 73 Tex. Cr. 583; 51 L. R. A. (N. S.) 1155; Wigmore on Evidence, Sections 2175, 2192, 2193; 100 Amer. Dec. 515; 28 R. C. L., p. 419, Sec. 3.

This is an ancient doctrine; it reaches back, in England, at least as long ago as 1562. (Act of V Eliz., Chap. 9, Sec. 12.) In the *Countess of Shrewsbury's Case*, 2

How. St. Tr. 769, at page 778 (decided in 1612), the reporter records Lord Bacon as saying:

> "All subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, *but of their knowledge and discovery.*"

The enforcement of this testimonial duty rests upon the courts themselves, which have power to assist a party in establishing proof by the procedure of compelling the attendance and testimony of witnesses (*Jackson* v. *Mobley,* 157 Ala. 408), **if a case is pending in court, but never otherwise.** (*Dudley* v. *McCord,* 65 Ia. 671; *Chambers* v. *Oehler,* 107 Ia. 155.) Under such circumstances any party has a right to impose this duty to testify upon any person who can be properly served (*Raymond* v. *Topson,* 22 Chan. 430), even though he be a high government official (*Rex* v. *Baines,* 25 T. L. R. 79).

When an individual is served with a subpoena ordering him to appear in court and testify as to his knowledge of certain matters pertaining to that litigation, or when he is summoned by the grand jury, an adjunct of a court, to testify as to matters being investigated for judicial purposes, clearly he is *deprived of his liberty and of property rights.* Frequently he must leave his business affairs and come many miles; in many cases this duty is an exceedingly onerous one. There must be some vital justification for the action of the court in depriving a citizen of his liberty and his property in this very serious way, to avoid a violation of the "due process of law" clause of the Constitution.

While the fact that the practice seems to be an ancient one has some relevance in making it due process of law (*Munn* v. *Illinois,* 94 U. S. 113), that is by no means conclusive, particularly since in England the duty seems in early times to have been largely statutory and not

transplanted to this country with the common law. (See V Eliz., Chapter 9, Section 12; VII & VIII William III, Chapter 3, Section 7.)

The real reason that this duty can be imposed and enforced in a court of law without violation of the due process clause is simply that **the social interest in having disputes between parties finally adjudicated in the courts, in having legal rights and duties authoritatively settled, is so strong that the private rights of all others in the community must yield to this social or community interest.** (*Blair* v. *United States,* 250 U. S. 273, 281; *In the matter of Davies,* 168 N. Y. 89.)

This social interest in the adjudication of disputes and the determination of legal rights and duties, being so vital to the operation of government, it cannot be claimed, therefore, that the duty to testify, and thereby make *effective* this effort of the courts to determine legal rights and duties, is an arbitrary or spoliative obligation, even though in individual cases it may be most burdensome and onerous. In other words, although there is a deprivation of liberty and property, this deprivation is not without due process of law for it is to fulfill a long-established "public policy," a public policy which is not arbitrary, but is in fact, indispensable to civilized government.

"Social Interest" Basis as Expressed in the Reports.

For typical illustrations of judicial expression of this "public policy" or "social interest" justification for the obligation to appear and testify, without which the deprivation of liberty and property involved would be a deprivation without due process of law, the following language is of interest:

"A witness, when subpoenaed in a private lawsuit, is compelled to leave his home, his usual avocation, and at his peril to appear at the time and place named for the purpose of giving testimony. * * * The law imposes this obligation upon him, in order that justice may be done. *It is a sacrifice that he must make for the benefit of the whole community,* the same as he must give up part of his property through the payment of taxes for the like purpose."

Matter of Davies, 168 N. Y. 89, 106.

"It is clearly recognized that the giving of testimony and the attendance upon court or grand jury, in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and in the performance of which he is entitled to no further compensation than that which the statutes provide. *The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.*"

Blair v. *United States,* 250 U. S. 273, 281.

"In no just sense can the requisition upon a citizen of his attendance upon court to testify as a witness be considered as the taking of private property for public use, within the meaning of the Constitution. The object of that provision in the fundamental law was to protect the citizen from the grasping demands of government, not to absolve him from any of those various personal duties which every good citizen owes to his country, such as the performance of military duty, obedience to the call of the proper authority for his personal service in suppressing a riot, the apprehension of a felon, affording assistance to officers in making arrests when resisted, and the like. There are very many instances in which the citizen is required to perform personal service or render aid to his government, without other compensation than that of his participation in the general good and his enjoyment of the general security and advantage which result from

common acquiescence in such obligations on the part of all the citizens alike and which is essential to the existence and safety of society."

West v. *State*, 1 Wis. 209, 233.

"What right have the courts to compel any one to quit his own affairs, no matter how pressing they may be, and attend as a witness or a juror in a litigation between strangers? This duty to assist others, who stand in need of our assistance, *for the maintenance of their rights*, necessarily flows from the relations we bear each other as members of the same community—we being mutually dependent upon each other for security and protection."

Bennett v. *Waller*, 23 Ill. 97, 179.

"It may be inconvenient and sometimes embarrassing, to the managers of a corporation, to require its books and papers to be taken from its office and exhibited to third persons, but it is also inconvenient and often onerous to individuals to require them to do the same things. Considerations of convenience must give way to the paramount rights of litigants to resort to evidence which it may be in the power of witnesses to produce without which grave interest may be jeopardized, and the administration of justice thwarted."

Wertheim v. *Continental Railway and Trust Company*, 15 Fed. 716.

"What then? Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary—they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of

it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a half-penny worth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No; most certainly."

Jeremy Bentham, Draft for a Judicial Establishment (Works, Bowring's ed., IV, 320).

Exceptions to the Testimonial Duty in the Courts Establishes Its Basis and Justification.

That the real bases for this duty are the social interests involved is clearly demonstrated by a consideration of the exceptions and the limitations placed by the courts upon the doctrine.

It is undisputed law that the courts will not compel testimony—that is, they make an *exception* to the rule of a general duty to testify—where the purpose of the testimony is simply to degrade the witness. In *Walters* v. *Seattle, etc., Railway Co.*, 48 Wash. 233, the court said:

"A witness may decline to answer questions whose only purpose is to degrade him, or expose him to disgrace and infamy."

The *social* interest in having every one compelled to answer any question put to him as a witness, yields to the countervailing *individual* interest of the witness (and a *social* interest in securing all individuals) against needless degradation.

In *Vanriper* v. *Vanriper*, 3 Lanc. L. Rev. (Pa.) 155, the court refused to compel a physician to attend as a witness where it appeared that his professional services were needed at the bedsides of his patients. The social interests involved were weighed by the court to reach

this result. In like manner, in states where there is a public policy against having women appear in court, unless absolutely necessary, the courts will refuse to issue subpoenas for the presence of women as witnesses. (See, *inter alia, Ex parte Jenks,* 141 Ala. 429; *Augusta, etc., Railroad* v. *Randolph,* 85 Ga. 297.)

It is elementary that certain communications as between attorney and client, physician and patient, priest and penitent, etc., are "privileged," *i. e.,* the court will not compel a client to testify as a witness, as to communications between himself and his attorney, etc. The general duty to testify because of the social interest in compelling witnesses to reveal all the facts, is modified in this case because of a countervailing social interest in safeguarding certain confidential relations.

Another good illustration of the principle is found in the familiar doctrine that a court will not compel a witness to reveal a trade secret in the course of his testimony. (See *Herreshoff* v. *Knietsch,* 127 Fed. 492.) The principle is further illustrated by *Commonwealth* v. *Barry,* 98 Ky. 394, where it was held that a witness should not be allowed to tell how he voted in an election, although such evidence was strictly material to the issues, the reason being that the public interest in his concealing such facts was stronger than the public interest in disclosing them. The same principle is to be found in *Totten* v. *United States,* 92 U. S. 105, where it was held that a public officer could not be required as a witness to disclose military secrets. And in *Robinson* v. *Philadelphia & Reading R. Co.,* 28 Fed. 340, at 342, the court said that in the exercise of the power to compel testimony in courts care must be used to avoid "unnecessary and improper inquiry into private affairs."

This same principle is illustrated in another line of cases to the effect that a court cannot compel testimony

unless its subpoena has been issued in a *pending proceeding, that is, a proceeding, the result of which will be the determination of legal rights and duties.*

In *Chambers* v. *Oehler,* 107 Ia. 155, a Justice of the Peace had issued a subpoena commanding A to appear on a certain day in an action brought by X against Y. In fact there was no such action pending. If the witness summoned had appeared on the day named, the giving of his testimony could not have assisted in determining the legal rights of any individuals. The witness refused to appear, was arrested and confined for contempt by the Justice of the Peace. The Supreme Court of Iowa held:

> "We take it that the pendency of some proceeding in court is necessary in order to warrant the issuance of process for witnesses * * * the subpoena having been issued without authority, the plaintiff was justified in disobeying it."

In other words, a court of law cannot force the testimonial duty, cannot enforce the deprivation of liberty and property involved in the testimonial duty, unless its action is supported by the social interest in the determination of *legal* rights and obligations. (Another case of this same sort is *Dudley* v. *McChord,* 65 Ia. 671.)

[If a court cannot issue a subpoena to compel testimony in a non-judicial inquiry by a judicial tribunal, where will it derive authority to compel testimony in a non-judicial inquiry by a non-judicial tribunal?]

An interesting case in the English King's Bench (*Rex* v. *Baines,* 25 T. L. R. 79), demonstrates how this same balancing of social interests is employed to determine if the testimonial duty should be enforced. It appeared that Messrs. Asquith and Gladstone, Ministers of the Crown, had observed a riot outside a hall in which they were speaking. Subpoenas were issued to them to appear and testify as to the riot, the subpoenas issuing

upon the request of the defendants in the riot case. Although not in the report of the case, the facts were that the riot defendants were militant suffragettes, intent upon doing all they could to annoy the Ministers, in accordance with the tactics employed at the time. The Ministers filed affidavits that they would be unable to give any testimony relevant to the case and *Rex* v. *Baines*, was a rule upon the defendants to show cause why the subpoenas should not be set aside. The court set aside the subpoenas. After making it clear that the decision rested in nowise upon the fact that the witnesses summoned were high officials of the government, Mr. Justice Bingham said that the court had to inquire whether its process had been issued with the object and expectation on reasonable grounds of obtaining relevant evidence. The court was satisfied "that this process had not been issued for the simple and proper purpose of obtaining evidence, but for a different and ulterior purpose, to which the process of this court ought not be applied." In other words, the public interest in not permitting individuals to be harrassed and vexed by their opponents, through the use of subpoenas, in this case outweighed the interest in requiring everyone likely to have any knowledge of matters in dispute to appear and testify

The Privilege Against Self-Incrimination Illustrates the Basis of the Testimonial Duty.

A well known exception to the general duty resting upon every person to appear and testify as a witness in a court, is the privilege against self-incrimination. The privilege against self-incrimination is simply a rule of law produced by a weighing of two sets of social interests: (1) the social interest in the determination of legal rights made effective by requiring any witness to testify as to all he knows; (2) the social interest in safeguard-

ing each individual from criminal prosecution because of matters on which he may testify in a suit in which he has no interest or connection other than as a witness called by a private litigant. In weighing these two conflicting interests, the latter has prevailed.

The opinion in *Hale* v. *Henkel*, 201 U. S. 43, makes it clear that this is the basis of the privilege against self-incrimination. In that case the constitutional right was interposed as a justification for refusal to produce certain evidence and the court held at page 74:

> "The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigator, so far as it may tend to incriminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure, except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights."

It has been held that where a subpoena has been issued requiring an individual to appear and testify under circumstances where it is clear that such testimony will relate only to incriminating matter, the subpoena not only need not be obeyed, but *the court will vacate it*, upon motion being made. (*Matter of Phillips*, 70 N. Y. Misc., 8; *Matter of Attorney General*, 21 N. Y. Misc., 101; and see 24 Harvard Law Review, 587.)

(2) The Duty to Testify Before Legislative Bodies or Committees Thereof.

The Legislative branch of the Government can compel the giving of testimony, that is, can enforce the general testimonial duty, but only in a very limited field, and for very limited purposes. When the Legislature, acting outside this limited field, attempts to compel an individual to appear and testify before it, or, as is usually the case, before one of its committees, that individual can refuse obedience, on the ground that such compulsion would deprive him of liberty and property without due process of law. That there must be some special justification for the enforcement of the testimonial duty by Congress is expressed in *Kilbourn* v. *Thompson*, 103 U. S. 168:

> "No general power of inflicting punishment by the Congress of the United States is found in that instrument [the Constitution]. It contains in the provision that 'no person shall be deprived of life, liberty, or property, without due process of law,' the strongest implication against punishment by order of the legislative body."

This whole matter of the power of Congress to compel giving of testimony is exhaustively gone into in the above cited leading case of *Kilbourn* v. *Thompson*. It there appeared that the House of Representatives had, by resolution, ordered an investigation of a certain "real estate pool" in which Jay Cooke & Company had a large interest; it further appeared that the Government of the United States was a large creditor of Jay Cooke & Company, and that the rights of all creditors, including the United States, were at the time pending in the courts. The investigation was conducted by a committee of the House, in the course of which Kilbourn was called as a witness by the committee. He refused to answer certain questions pertaining to the real estate pool. The House

passed a resolution finding him guilty of contempt of its authority, and under the direction of the House he was arrested by its Sergeant at Arms and confined in jail. For this confinement he brought suit against the Sergeant at Arms and various members of the House who had procured the arrest and confinement. The defendants pleaded the action of the House, and the court held, as to the Sergeant at Arms, that the plea was not good.

The important points decided or discussed in the extended opinion are as follows:

(1) That the English authorities relied upon, in which it had been held that the House of Commons had power to punish for contempt of its orders in the enforcement of the testimonial duty, are not applicable.

> "We are of the opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices. Nor, taking what has fallen from the English judges, and especially the later cases on which we have just commented, is much aid given to the doctrine that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation."

(2) That the House *does* have the right to enforce the testimonial duty in the course of its *judicial* functions specifically authorized by the Constitution.

> "Each House is by the Constitution made the judge of the election and qualification of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and *it may be* that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature.

"The House of Representatives has the sole right to impeach officers of the government, and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases."

The court indicates that these powers of the House really are not genuinely *legislative*. They are strictly analogous to the *judicial* functions of the House of Commons. So it was said by DeGray, Chief Justice, in *Case of Crosby, Lord Mayor of London*, 3 Wills 188 (1771), "such an assembly [the House of Commons] must certainly have such authority * * * Lord Coke says they have a judicial power; each member has a judicial seat in the House; he speaks of matters of judicature of the House of Commons"; and Mr. Justice Blackstone, concurring, said, "The House of Commons is a Supreme Court and they are judges of their own privileges and contempts, more especially with respect to their own members." In the same opinion Mr. Justice Gould stated that the "House of Commons may be properly called judges." See, also, *Burdette* v. *Abbott*, 14 East 1; *Case of the Sheriff of Middlesex*, 11 Ad. & E. 273.

(3) That the House of Representatives has no power to compel the testimony of witnesses or enforce the testimonial duty in any matter outside of the "jurisdiction to inquire" of the House.

"Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."

[If the Congress has no "general power of making inquiry," it surely cannot delegate or grant such power to an administrative tribunal.]

Later Supreme Court cases have thrown little additional light upon the question involved in *Kilbourn* v. *Thompson*. In *In re Chapman*, 166 U. S. 661, the Congressional proceeding was clearly within the *judicial* jurisdiction of Congress, so no serious question was raised, and in *Henry* v. *Henkel*, 235 U. S. 219, the court simply refused, upon an application for a writ of *habeas corpus*, to pass upon the constitutionality of the act by virtue of which the witness was in custody.

A recent decision in an inferior Federal Court considered this problem. In *United States* v. *Sinclair*, (Supreme Court, D. C. July 14, 1924), the facts were that Harry F. Sinclair, who had been called as a witness in the so-called Teapot Dome investigation, refused to answer certain questions. For this he was indicted under Section 102 of the Revised Statutes, (Act of Jan. 24, 1857, c. 19, 11 Stat. 155) making it a misdemeanor to refuse to give testimony before either House of Congress "upon any matter under inquiry before either House or any Committee of either House of Congress." Sinclair demurred to the indictment on the ground that the statute was unconstitutional and his counsel filed an exhaustive and learned brief in which it was contended that, while Congress has judicial power in dealing with the qualifications of its members, their punishment for misconduct, impeachments, and contested elections, Congress could not, without violation of the Fourth and Fifth Amendments compel the giving of testimony or the production of documents in the aid of legislative investigations. Judge Hoehling refused to sustain the demurrer to the indictment, holding that the unconstitutionality of the statute was not clear. The

following language from the decision is pertinent in connection with the discussion under this point of the brief:

> "The question is of grave importance since, *without* the power to compel testimony, Congress in its need of information in discharge of its legislative functions, will be largely limited to such information as may be given it freely and voluntarily; whereas *with* such power, the right of the people to be secure in person, house, papers and effects from enforceable intrusion and compulsory exposure, will be made subservient to the will of Congress, restrained only by its good faith."

The court, it will be seen, was *balancing the social consequences* of the alternatives presented.

In another very recent case, *Ex parte Daugherty,* 229 Fed. 620, the court expressed "very serious doubt of the existence" of the power of either house to compel testimony in aid of legislation, the holding being, however, that the investigation in question was of an administrative officer in his individual capacity (p. 640) and so not within the Senate's jurisdiction.

On the authorities available, it appears that the courts find the social interest in permitting a legislature to conduct investigations **for the purpose of legislation** a sufficient constitutional justification for the deprivation of the liberty and property of a witness, making such deprivation **with** due process of law. (And see an extended note, 38 Harvard Law Rev. 235, December, 1924.)

The rulings in other than the Federal courts are not uniform on the question. *People* v. *Keeler,* 99 N. Y. 219, is probably the only decision squarely upholding the broad power of state legislatures to compel testimony in aid of legislation. The problem has been raised in the British Colonies where the parliamentary usage does not control, and in at least two cases the courts have refused to permit legislatures to compel testimony even in aid of legis-

lative investigations. (*Fenton* v. *Hampton*, 11 Moore P. C. Van Dieman's Land; *Landers* v. *Woodward*, 2 Can. S. C. R. 158, Nova Scotia.)

The following cases dealing with this problem are listed to indicate the uncertainty arising as soon as an effort is made to compel testimony outside *judicial* proceedings. But these cases have only indirect bearing on the present issue, as indicative of the limited power which a legislative body possesses in this regard, which it may "delegate" or grant to any non-judicial body:

Burnham v. *Morrissey*, 14 Gray, (Mass.) 226.
In re Falvey, 7 Wis. 630.
State v. *Frear*, 138 Wis. 173.
Ex parte Bunkers, 1 Calif. App. 61.
Ex parte McCarthy, 29 Calif. 295.
Yoe v. *Hoffman*, 61 Kan. 265.
Emery's Case, 107 Mass. 172.
Lowe v. *Sumner*, 69 Mo. App. 637.
Ex parte Parker, 74 S. C. 466.
Sullivan v. *Hill*, 73 W. Va. 49.
Ex parte Dansereau, XIX, Lower Can. Jurist. 210.
In re Pacific Railway Commission, 32 Fed. 241.
Whitcomb's Case, 120 Mass. 118.
State v. *Brewster*, 89 N. J. L. 665.
State v. *Scott*, 89 N. J. L. 658.
Ex parte Walters, 64 Texas Cr. 238.

On the power of the Executive to enforce the testimonial duty see: *Anderson* v. *Dunn*, 6 Wheat. 204, 228, 233, 234; *Ex parte Daugherty*, *supra*, at 637; *State* v. *Frazier*, 182 N. W. 551 (N. Dak.).

(3) The Duty to Testify Before Administrative Tribunals.

To these administrative tribunals have been delegated* two kinds of duties and functions: (1) **Legislative**, such as rate-making powers, or the formulation of some public policy, as by the Coal Commission, the Commission on Industrial Relations, or the Railroad Labor Board; (2) **Judicial**, illustrated by many of the powers vested in the Interstate Commerce Commission, including the power to order the payment of damages for injuries inflicted in the past (Sec. 16 of the Interstate Commerce Act of Feb. 4, 1887, as amended), a distinctly judiciail function (*Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226), and the determination of legal rights under the Interstate Commerce Act.

An examination of the decisions in this field will demonstrate that in determining whether a certain adminis-

*In using the word "delegated" counsel are aware that the Supreme Court has frequently said that the powers of one branch of the government cannot be delegated to another because of the doctrine of the separation of the powers. It has beer observed that "although dozens of cases have raised the issue, in not a single instance has the Supreme Court declared an Act of Congress unconstitutional'" upon this ground. (37 Harvard Law Rev. 1010, 1013, note.)

The following candid statement of Mr. Chief Justice Taft appears in the course of his comment on the judicial career of the late Chief Justice White:

"The Interstate Commerce Commission was authorized to exercise powers, the conferring of which by Congress would have been, perhaps, thought in the earlier years of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress in exigencies of government and the utter inability of Congress to give the time and attention indispensable to the exercise of these powers in detail forced the modification of the rule. Similar necessity caused Congress to create other bodies with analogous relations to the existing legislative, executive and judicial machinery of the Federal Government, and these in due course came under the examination of this court. Here was a new field of administrative law which needed a knowledge of government and an experienced understanding of our institutions safely to define and declare. The pioneer work of Chief Justice White in this field entitles him to the gratitude of his countrymen."

(257 U. S. xxv-xxvi.)

For a valuable discussion of the doctrine of separation of powers see Frankfurter and Landis, 37 Harvard Law Review 1010.

trative tribunal can require testimony before it, the courts have adopted the same approach to the problem employed in imposing limits upon the exercise of the power by the courts themselves, and legislative bodies, viz.: *a balance of the social interests involved.*

Such an examination will demonstrate the further fact that in balancing the social interests the courts have utilized this test: **A person cannot be constitutionally compelled by the courts to appear and testify before an administrative tribunal unless that tribunal has authority to determine legal rights or duties.** If the tribunal has no such powers conferred upon it, then to deprive a witness of his liberty and property by compelling him to appear and testify is **a deprivation without due process of law,** because the social interest in protecting individuals against intrusion into their affairs and compulsion to leave their homes and duties, outweighs the social interest merely in securing information about the railroad industry, the coal industry, etc., and in recommending a public policy thereon.

The Brimson Case.

Here we must start from the elementary principle that, in the language of the Supreme Court in *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447: **"there is no such thing as contempt of a subordinate administrative body."** In those cases where an administrative body is given power by Act of Congress to compel testimony, the enforcement of this duty must be by resort to the courts. The question then becomes: In what cases and under what circumstances can *the courts* force a person to testify before an administrative body, without conflict with the due process clause of the Constitution?

The starting point in a review of authorities on this matter must be *Interstate Commerce Commission* v. *Brimson, supra,* decided in 1894. That case involved the constitutionality of Section 12 of the Interstate Commerce Act of Feb. 4, 1887, as it then existed. At that time the outstanding provisions of the Interstate Commerce Act (which the court reviewed at length in its opinion) were as follows:

1. All charges for services in transportation must be reasonable, and unreasonable charges are declared *unlawful.*
2. Unjust discrimination and undue advantages are defined and declared *unlawful.*
3. It is made *unlawful* for any carrier to make a greater charge for a short than a long haul.
4. Pooling of competing carriers is made *unlawful.*
5. Tariffs, etc., are required to be posted and changes in tariffs, etc., are declared *unlawful* unless after public notice; and the act authorizes a writ of mandamus to be issued wherever there is a failure to comply with these provisions, such writ to issue in the name of the United States, on the relation of the Commission; a failure to comply with the provisions of the writ are to be punishable as a contempt of court; a writ of injunction is authorized against a carrier to be applied for by the Commission wherever a carrier refuses obedience to these requirements.
6. It is made *unlawful* for any carrier to enter into an agreement to prevent by any means the carriage of freight from being continuous from place of shipment to place of designation.
7. The Act creates the Interstate Commerce Commission.
8. The Act specifies the ways in which the Act *may be enforced by the Commission,* or by private parties injured by acts of the carriers against the terms of the Act.
9. Section 12 (26 Stat. 743, c. 128), the constitutionality of which was the issue involved in the case, is in part as follows:

"That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and **enforce** the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and **for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses** and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena **the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses** and the production of books, papers, and documents under the provisions of this section.

"And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or

other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

It should be noted from the outset that the Interstate Commerce Act had made certain acts or conduct *unlawful,* and that the Interstate Commerce Commission had been given power by Congress to determine *legal rights* and impose *legal obligations.* Congress had exercised its legislative power to declare unreasonable rates unlawful; the Commission had been empowered with the *judicial* authority to declare *what specific rates are unreasonable.*

It appeared in the *Brimson* case that complaint had been made to the Interstate Commerce Commission that certain carriers and industrial companies were evading those provisions of the Act which forbid undue advantages, discriminations and unreasonable rates.

The Commission decided to make an investigation to determine if the law was being violated, and as a step in this investigation it ordered the various companies to file with it certain material, to answer certain questions propounded to them by the Commission, and to appear before the Commission on a set date. Certain officers of the companies were subpoenaed to appear and testify at the hearing. They appeared, but refused to answer certain questions put to them by the Commission, and refused to comply with the terms of subpeonas *duces tecum* of the Commission. The Commission thereupon presented a petition to the Federal Court, setting out the circumstances and the grant of power given it under Section 12 of the Act and prayed for an order requiring the recalcitrant witnesses to appear and answer the ques-

tions asked them, and produce the books, etc., demanded by the subpoenas. The answers of the witnesses to this petition set up its unconstitutionality and this contention the lower court approved, denying the petition of the Interstate Commerce Commission. (53 Fed. 476.)

The Supreme Court, on the appeal upheld the constitutionality of Section 12. The case, in the opinion of the majority (three justices dissented) turned on the question of whether the situation in the lower court presented a "case" or "controversy" within the meaning of the third article of the Constitution, so that a court could take jurisdiction in the premises.

Throughout its opinion, the court, speaking through Mr. Justice Harlan, made clear that it was dealing with a situation in which Congress had declared certain acts or conduct *unlawful*, and that the Commission had been created and empowered by Congress to *enforce the legal obligations and prohibitions created.* So, the court in seeking to determine what a case or controversy is, quoted from *Smith* v. *Adams*, 130 U. S. 173:

> "Mr. Justice Field, speaking for the court, said that the terms, 'cases' and 'controversies' in the Constitution embraced 'the claims or contentions of litigants brought before the court for adjudication by regular proceedings established for the protection or *enforcement of rights, or the prevention, redress or punishment of wrongs.*'"

And a few lines further we find this reasoning:

> "Why is not this proceeding judicial * * * a case or controversy for judicial cognizance within the meaning of the Constitution? It must be so regarded, unless, as is contended, Congress is without power to provide any method for *enforcing the statute* or compelling obedience to the *lawful orders* of the Commission. * * *"

And later:

> "We cannot adjudge that the mode prescribed for enforcing the *lawful orders* of the Interstate Com-

mission is not calculated to attain the object for which Congress was given power to regulate interstate commerce."

And again:

"Without the aid of judicial process of some kind, the *regulations* that Congress may establish in respect to interstate commerce *cannot be adequately or efficiently enforced.*"

Stil further on in the opinion we read:

"Indeed, of all the modes that can be constitutionally prescribed for the enforcement of the *regulations* embodied in the Interstate Commerce Act etc. * * *"

This case being the principal reliance of the proponents of the constitutionality of Section 310 of the Transportation Act, it is important, therefore, to observe carefully three features of the case upon which the court relied:

1. **That Congress, in the Interstate Commerce Act had laid down regulations to govern commerce between the states and had created certain legal obligations and prohibitions with reference to that commerce.**
2. **That Congress had vested in the Interstate Commerce Commission the power of translating these legislative duties into specific legal obligations upon specific persons.**
3. **That the proceeding out of which the Brimson Case finally arose was an effort by the Commission to enforce certain legal obligations created by Congress in the Interstate Commerce Act.**

It is clear that the court sustained the compulsion of testimony provision on the basis of the exercise of *judicial* power by the Commission. The following quotation is illustrative:

"Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investiga-

tion by *a Commission established for the purpose of enforcing that Act,* we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences."

* * * * *

"We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result, indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result, directly, and by a different proceeding *judicial in form.* We could not do so without denying to Congress the broad discretion with which it is invested by the Constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish, namely, *the protection of interstate commerce against improper burdens and discriminations.*"

We have pointed out, heretofore that a witness is not deprived of his liberty and property when he is compelled to testify in a proceeding to enforce *legal* obligations, because of the social interest in the determination of *legal* rights. *The Brimson case presents a situation in which the duty to testify can be enforced by a court on behalf of an administrative tribunal without unconstitutional deprivation of property and liberty because the proceeding for which the testimony was sought to be compelled was for the purpose of determining legal rights and imposing legal obligations.*

But we contend that an unconstitutional deprivation of liberty and of property takes place when an individual is compelled to testify in a proceeding which is *not* for the purpose of enforcing *legal* rights or imposing or determining legal obligations. In direct support of this position is *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 408, which was decided in 1908 following

the *Brimson* case, and which distinctly limits the authority of the *Brimson* case in harmony with our contentions.

The Harriman Case.

It appeared in the *Harriman* case that the Interstate Commerce Commission, *on its own motion,* instituted an investigation of consolidations and combinations of carriers which it believed tended to defeat the purposes of the Act. A hearing was begun and Edward H. Harriman and Otto H. Kahn appeared before the Commission, under its subpoena. They were asked certain questions relating to the true ownership of certain shares of railroad stock, and upon advice of counsel refused to answer the questions. Proceeding under Section 12 of the Act, the Commission thereupon petitioned the Circuit Court for an order compelling the witnesses to answer the questions propounded, and this order was granted. On appeal the Supreme Court (three justices dissenting) reversed the order below and denied the petition of the Commission.

The majority, speaking through Mr. Justice Holmes, after stating the questions asked, characterized the inquiry being pursued by the Commission in this language:

> "This was a general inquiry started by the Commission on its own motion, not an investigation on complaint, or of some specific matter that might be the object of a complaint."

Counsel for the Commission attempted to support its position in part by setting out that portion of the Interstate Commerce Act which authorizes the Commission to "make any investigation that it deems proper, not merely to discover any facts tending to defeat any purposes of the act, * * * but to aid it in recommending any additional legislation relating to the regulation of commerce, that it may conceive to be within the power of

Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witnesses to answer any question that may have a bearing upon any part of what it has in mind." The arguments of counsel were thus characterized (pp. 417-418) by the learned justice who wrote the majority opinion:

> "And the result of the arguments is that whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only legitimately influence the mind of the Commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent. Its territorial sweep also should be noticed. By Sec. 12 of the Act of 1887, the Commission has authority to require the attendance of witnesses 'from any place in the Uinted States, at any designated place of hearing.' *No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.*"

The court then entered into a construction of the Interstate Commerce Act and proceeded as follows:

> "The Commission, it will be seen, is given power to require the testimony of witnesses 'for the purposes of this act.' The argument for the Commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the Commission. That one of the purposes is that the Commission shall keep itself informed as to the manner and method in which the business of the carrier is conducted, as required by Sec. 12; that another is that it shall recommend additional legislation under Sec. 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require anyone whom it may point out to attend and testify if he would avoid the penalties for contempt.

> "We are of opinion, on the contrary, that the purposes of the act for which the Commission may exact evidence *embrace only complaints for violation of the act,* and investigations by the Commission upon matters that might have been made the object of the complaint. As we have already implied, *the main purpose of the act was to regulate the interstate business of carriers,* and the secondary purpose, that for which the Commission was established, was *to enforce the regulations* enacted. These, in our opinion, are the purposes referred to; in other words, **the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.**" (pp. 419-421.)

The court thus held that the Interstate Commerce Act only authorizes the Commission to compel testimony (through the aid of the courts) *in the same manner and subject to the same limitations as courts of law may enforce the testimonial duty without unconstitutional deprivation of liberty and property,* namely, where the purpose of the proceeding is to enforce a legal duty or impose a legal obligation; or, to use the language of the court in this case, where the proceedings "concern a specific breach of law." *Had the court been unable to agree on such a construction of the Act of Congress there is a clear indication that it would have invalidated the legislation as a violation of the constitutional safeguards.*

We quote the following forceful language of the court in the *Harriman* case:

> "If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the *quasi judicial* duties of the Commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from sections 12 and 21. *We could not believe,* on the strength of other than explicit and unmistakable words, *that*

such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed. * * *

"If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits. *Knights Templars' & M. Life Indemnity Co.* v. *Jarman,* 187 U. S. 197, 205." (pp. 421-422.)

Counsel for appellee have indicated a reliance upon *Smith* v. *Interstate Commerce Commissoin,* 245 U. S. 33, to weaken the force of the *Harriman case.* But in the *Smith case,* the opinion of this court is expressly placed upon the ground that "there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce" (p. 43). In other words, an interstate carrier may be subjected to examinations which would be wholly improper if the private business of a private person were being investigated. That the decision in the *Smith case* is to be limited to investigations into the business of interstate carriers was very recently stated by the Supreme Court, in the *American Tobacco case.* In that case counsel for the Federal Trade Commission urged the decision in the *Smith case* to sustain the power of the Commission to carry on general investigations not concerned with a specific breach of law, just as counsel for the Railroad Labor Board will now urge that decision. The court rejected such an interpretation of the plain language of the *Smith case* in these words:

"The mere facts of carrying on a commerce not confined within State lines, and of being organized as a corporation, do not make men's affairs public, as those of a railroad corporation now may be. Smith

v. Interstate Commerce Commission, 245 U. S. 33, 43."

Federal Trade Commission v. *American Tobacco Co.*, Adv. Ops. U. S. Sup. Ct., Oct. Term, 1923, 382, 383.

Federal Trade Commission Cases.

From the position taken in the *Harriman Case* the Supreme Court has never departed. In *Federal Trade Commission* v. *American Tobacco Co., supra,* decided March 17, 1924, the Federal Trade Commission sought an order upon certain tobacco companies under a provision in the Federal Trade Commission Act of September 26, 1914 (38 Stat. 717, 722, sec. 9) similar in purpose and procedure to Section 12 of the Interstate Commerce Act and Section 310 of the Transportation Act, directing them to produce certain documents in the course of an investigation which the Commission was making. No "specific breach of the law," to use the language employed by Mr. Justice Holmes in the *Harriman Case,* had been alleged. The court, while it had before it a question of "unreasonable searches and seizures", delivered an opinion of significance in the present case:

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies *to sweep all our traditions into the fire* (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as *nothing short of the most explicit language would induce us to attribute to Congress that intent.* The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the commission's wholesale demand would cause, are

> the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407."

It will be noted that the *Harriman Case* is relied upon and reaffirmed in the *American Tobacco* case, and that *Interstate Commerce Commission* v. *Brimson,* is cited, *not* to support a power to compel testimony where no strong social interest would thereby be subserved, but rather **to indicate that "our traditions" are opposed to an extension of this testimonial duty beyond the narrowest limits compatible with the public interests.**

In addition to the decision of the Supreme Court in the *American Tobocco case,* a brief reference should be made to similar cases affecting the Federal Trade Commission which have been considered by the inferior federal courts.

Federal Trade Commission v. *Baltimore Grain Co.,* 284 Fed. 886, involved a petition by the Commission for access to the records of the Grain Company. There were also petitions filed against H. C. Jones Co. and Hammond Snyder Co. All the petitions were denied on November 21, 1922, by United States District Judge Rose, whose opinion reads in part as follows:

> "The precise question here to be decided is whether the statute confers upon the Commission the right to inspect and copy the papers of any private corporation engaged in interstate or foreign commerce, *whenever,* in the judgment of the Commission, *such inspection may furnish information of value to an inquiry it is making as to some economic or commercial problem, and when it has no reason to believe that any violation of law has been committed.* * * * For upwards of a century and a half there has been no doubt that general warrants

are forbidden. No official can be given authority to rummage through the papers of an individual without the latter's consent, in the hope that something or other may be discovered useful for some public purpose. * * * If it [the Trade Commission Act, Sec. 9], really means that whenever the Commission thinks best to make an inquiry into the way in which some great department of commerce is carried on, it may send its employees into the office of every private corporation which does an interstate business in that line and empower them to go through the company's books, correspondence and other papers, I am satisfied it goes beyond any power which Congress can confer, in this way at least."

In the case entitled *United States* v. *Basic Products Company,* 260 Fed. 472, United States District Judge Orr held that the Commission was without power to demand access to records *for the purpose of obtaining information* for the Navy Department as to the cost of manufacture, annual production, capital invested, etc. It was urged in that case that Section 6 of the Federal Trade Commission Act was unconstitutional, and the court remarked, *"The contention of counsel is probably sound,"* but based its decision on the ground that the Commission lacked power to conduct the particular investigation undertaken.

Subsequent to the decision in the *Basic Products* case, the Commission adopted a resolution to collect and publish information in respect to certain basic industries and directed the coal and steel operators to submit monthly reports showing cost of production, prices, orders and similar recorded data. Upon refusal of the demand, petitions were filed against two of the steel companies, but proceedings were stayed by an injunction granted by the Supreme Court of the District of Columbia, June 19, 1920, in the case entitled *Claire Furnace Company et al.* v. *Federal Trade Commission.* No opin-

ion was filed in this case, but the decision was evidently based upon the opinion of the same judge in the previous case of *Maynard Coal Company* v. *Federal Trade Commission* (decided April 19, 1920). The decree of the court in the *Claire Furnace Company* case making the injunction permanent was affirmed by the Court of Appeals of the District of Columbia January 2, 1923, the case being reported in 285 Fed. 936. The opinion of the Court of Appeals reads in part as follows:

> *"The investigation seems to be more in the nature of a news-gathering expedition, in hope of securing something of public interest for publication or possibly subject-matter for future legislation by Congress.* * * * The most that can be gathered from the answer is that a general survey of the coal, coke, steel, and allied industries is contemplated in a tentative search for information relative to the high cost of living. We are not impressed by the contention that the Commission is invested with authority to inquire into and regulate any business of nationwide extent, or that the scope of its visitorial powers is co-extensive with the constitutional functions of Congress. As already suggested, we think the activities of the Commission are strictly limited to the field of commerce except so much thereof as has been occupied by the Act to Regulate Commerce and by the Federal Reserve Act."

It seems appropriate to comment that the idea that an investigative commission (functioning merely to gather information and publish it for the purpose of affecting public opinion) may be authorized to compel the production of evidence through court orders, seems to be abhorrent to the courts, as comprehending an unwarranted invasion of constitutionally protected privacy.

An article published in the Michigan Law Review of June, 1924, entitled "Fishing Expeditions by Commissions" reviews carefully all the cases available to that

date concerning the powers of the Federal Trade Commission and reaches two conclusions: (1) that the courts have uniformly refused to enjoin the Commission from proceeding under Section 5 of the Act; and (2) that "The Commission's efforts, however, to enforce the provisions of Sections 9 and 10 of the Act have been *uniformly repulsed* by the courts. * * * Its efforts to exercise *visitorial* powers under Sections 6, 9 and 10, as we have seen, have *in every instance failed.* The plain truth is that there was and is a need for the powers exercised under Section 5; but the powers which Congress attempted to bestow upon the Commission in Sections 6, 9 and 10, if fully exercised, would prove an intolerable burden upon the business of the country."

The application of the Federal Trade Commission rulings to the present case is apt. Where an administrative commission is created for the purpose of determining, enforcing, or protecting *legal* rights and obligations, it is appropriate in the aid of such *quasi-judicial* powers to call upon the courts to exert *judicial* power. But where the function of a commission is merely the gathering of information, for the guidance of public officials, or as a basis for formulating public opinion, or for creating public policy, it is wholly inappropriate to call upon the judicial department of the government to exercise judicial power, which has been vested in the courts solely for the purpose of determining, enforcing, and protecting legal rights and obligations.

Pacific Railway Commission Case.

An important case in determining the law in this field is *In re Pacific Railway Commission,* 32 Fed. 241 (1887), heard before Mr. Justice Field and two circuit judges in the Northern District of California. This case was cited

and *quoted from with approval in the Brimson case,* at p. 479, and the opinion is both authoritative and persuasive in the decision of the present issue.

An Act of Congress of March 3, 1887, Sec. 2, 24 Stat. 488, authorized an investigation of certain government-aided carriers. Under this Act the president was to appoint three commissioners to examine the methods of certain carriers who had received government aid, and these commissioners were empowered to search into the financial management of such carriers and to determine whether any of their officers, etc., were financially interested in any other carriers, with whom these aided carriers had business arrangements; how and what amounts of money had been expended by the carriers, and whether any had been paid for the purpose of influencing legislation. The Act further provided that the Commissioners were to have the power "to require the attendance and testimony of witnesses, and the production of all papers * * * relating to the matter under investigation, and to that end may invoke *the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of papers* * * *." Any court of the United States was authorized to issue an order requiring such testimony, and a failure to obey such an order could be treated by the court as a contempt. It will be observed that this is substantially the procedure prescribed in Section 12 of the Interstate Commerce Act and Section 310 of the Transportation Act.

These Commissioners called Mr. Leland Stanford as a witness, he being the president of a government-aided carrier. Certain vouchers, credited only to "general expense account," etc., were produced, and the witness was asked to explain the character of the expenditures repre-

sented by these vouchers; he was further asked whether any part of the sum had been paid to influence legislation. Upon advice of counsel he refused to answer the questions.

The Commissioners then petitioned the Circuit Court of the United States for an order requiring an answer to the questions put to Mr. Stanford. Counsel for the witness urged, *inter alia*, that the Act, insofar as it authorized such an investigation as was being conducted, was unconstitutional.

Mr. Justice Field first set out the character of the Commission itself as "not a judicial body. * * * It can determine no rights of the government, nor of the companies whose affairs it investigates. * * * It is a mere Board of Inquiry, directed to obtain information upon certain matters. * * * " (It is undoubtedly true that one of the major purposes of making this "inquiry" was to inform and direct public opinion against the practices of these carriers. This parallels closely the activity of the Railroad Labor Board, as its purposes and powers have been defined by this court.)

Then the learned justice lays down the same limitations upon the power of an administrative body to compel testimony, through the instrumentality of the courts, as we find the Supreme Court of the United States giving expression to, in the *Harriman* case.

> "Congress may authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess. It may inquire into the extent of the productions of the country of every kind, natural and artificial, and seek information as to the habits, business, and even amusements of the people. *But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters.* In the pursuit of knowledge **it cannot compel the production of the private**

books and papers of the citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon averments that its **rights** are in some way dependent for enforcement upon the evidence those books and papers contain.

"Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also, in certain cases, for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained, and their contents made known, against the will of the owners."

And commenting on the famous *Boyd* case, 116 U. S. 616, the court says further:

"It is the aforesaid intrusion into, and compulsory exposure of one's private affairs and papers, *without judicial process, or in the course of judicial proceedings,* which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans."

The court then quotes from the celebrated case of general warrants, *Entick* v. *Carrington,* 19 How. St. Tr. 1029, where Lord Camden said:

"Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure they will hardly bear an inspection; and though the eye cannot, by the laws of England, be guilty of a trespass, yet, where papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that re-

spect. Where is the written law that gives any magistrate such a power? I can safely answer there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society."

The court then comments as follows:

"Compulsory process to produce such papers, not in a judicial proceeding, but before a commissioner of inquiry, is as subversive of 'all the comforts of society' as their seizure under the general warrant condemned in that case. The principles laid down in the opinion of Lord Camden, said the Supreme Court of the United States, 'affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court with its adventitious circumstances; they apply to all invasions on the part of the government, and its employes, of the sanctity of man's home and the privacies of life.'"

After reviewing the case of *Kilbourn* v. *Thompson,* and stating the extent of investigation authorized by the Act of Congress there involved, the court said, page 254:

"But in accordance with the principles declared in the case of *Kilbourn* v. *Thompson,* and the equally important doctrines announced in *Boyd* v. *United States,* the Commission is limited in its inquiries * * * to such matters as these persons may choose to disclose. * * * And they are entitled to the same protection and exemption from inquisitorial investigation into such business as any other citizens engaged in like business."

The court then expressed the opinion that the duties attempted to be imposed upon the courts of the United States to force compliance with the demands for testimony made by the Commission, could not be constitutionally conferred upon the courts, because those duties are not of such a character as fall within the limits of the judicial power, as that power is defined by the Constitution. In defining the constitutional terms "cases" and "controversies", Mr. Justice Field (using language

which he repeated two years later in the opinion of the Supreme Court in *Smith* v. *Adams*, 130 U. S. 173), made this statement:

> "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom *for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.*" (Of course, the learned justice is here speaking of *legal* rights and *legal* wrongs.)

The court concludes that

> "The provision of the Act authorizing the courts to aid in the investigation in the manner intended must therefore be adjudged *void* * * * if rights are to be protected, or wrongs redressed by any investigation, it must be conducted by regular proceedings in the courts of justice in cases authorized by the Constitution."

Circuit Judge Sawyer concurring in the opinion of the Circuit Justice said:

> "The court seems, therefore, to be called upon to compel, under process for contempt, an answer to any question which the commission sees fit to ask within the scope of the inquiry attempted to be authorized by the Act. If this be so, the court is simply made an instrument by this Act, in the hands of the commission, to execute its unregulated and unrestricted will. The court is made the ministerial agent of the commission to perform its behests, whenever a witness refuses to respond to a question, or produce papers within the range of the authority attempted to be given by the statute. The judicial department of the government is simply made, by this act, an adjunct to the legislative department in the exercise of its political and legislative functions, and powers, to execute its commands,—and that, too, in a matter into which Congress, under the decision cited, has no jurisdiction whatever to inquire. I know of no power in Congress, to thus render the judicial department subordinate, or ancillary to the legislative and executive departments of the govern-

ment, or to either of them. If there is any one proposition immutably established, I had supposed it to be, that the judiciary department is absolutely independent of the other departments of the government—that it cannot be called upon to act a part subordinate to any other department of the government, or to a commission armed with exasperating inquisitorial powers over private affairs, unlimited by any consideration other than its own unregulated discretion. And so I understand the authorities to be."

The learned Circuit Judge concluded his concurring opinion in this manner:

"The courts * * * are called upon not to exercise their ordinary powers in the administration of justice, but to assist Congress in the exercise of its deliberative, legislative and political powers,—to aid it by irregular, and extraordinary, not to say unprecedented means,—to act as its agent in matters wholly foreign to the functions of the judiciary."

Circuit Judge Sabin also wrote a brief concurring opinion from which we make a few pertinent quotations:

"The court * * * is simply called upon by the Commission to execute its will; to compel the attendance and obedience of witnesses—a purely ministerial duty,—to serve as a convenient adjunct to the commission. I cannot think that the courts were organized for any such purpose, or that they can be called upon to perform any such duty. * * * *."

"Is not this, then, a mere idle inquiry, not made in the interest of, or to preserve or establish the rights of the government or any person?"

Applying the Well Established Law to the Petition of the Railroad Labor Board.

Coming now to the Railroad Labor Board, the decisions defining its powers and functions and an application of the principles set out above will demonstrate that to deprive the appellant of his liberty and his property, by forcing him to appear and testify before the Board, would be a deprivation *without* due process of law because such deprivation is not justified by any resultant determination of legal rights.

On February 19, 1923, the Supreme Court, in an unanimous opinion delivered by Mr. Chief Justice Taft, interpreted the Transportation Act and the powers of the Board in *Pennsylvania Railroad Company* v. *United States Railroad Labor Board,* 261 U. S. 72, where at page 79, the court describes the procedure of the Board as follows:

> "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion strengthened by the official prestige of the Board and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the public in the undisturbed flow of interstate commerce, and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy, and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it."

Then at page 84 the limits of the Act are set out in clear and unmistakable language, making utterly inapplicable the *Brimson* case as an authority to support the

constitutionality of Section 310 as counsel for the Labor Board would have that section construed:

"But Title III was *not enacted to provide a tribunal to determine what were the legal rights* and obligations of railway employers and employes, *or to enforce or protect them.* Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to co-operate in running the railroad. It was to reach a fair compromise between the parties, *without regard to the legal rights* upon which each side might insist in a court of law. The Board is to act as a board of arbitration. It is to give expression to its view of the *moral obligation* of each side, as members of society, to agree upon a basis for co-operation in the work of running the railroad in the public interest. The only limitation upon the Board's decisions is that they should establish a standard of conditions which, in its opinion, is just and reasonable. The jurisdiction of the Board to direct the parties to do what it deems they should do is *not to be limited by their constitutional or legal right to refuse to do it.* Under the act there is *no constraint upon them to do what the Board decides they should do* except the moral constraint, already mentioned, of publication of its decision.

"It is not for this or for any other court to pass upon the correctness of the conclusion of the Labor Board if it keeps within the jurisdiction thus assigned to it by the statute. The statute does not require the railway company to recognize or to deal with or confer with labor unions. It does not reuire employes to deal with their employers through their fellow employes. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen, with a view to securing a satisfactory co-operation, and leaves it to the two sides to accept or reject the decision. The statute provides the machinery for conferences, the hearings, the decisions, and the moral sanction. The Labor Board must comply with the requirements of the statute; but, having thus complied, it is *not,* in its reasonings and conclusions, *limited,* as a court is limited, *to a consideration of the legal rights of the parties.*"

Following this authoritative definition of the nature of Title III and of the Railroad Labor Board, the same problem was raised in litigation in the inferior Federal courts. In *Brotherhood of Clerks* v. *Pennsylvania Railroad,* 294 Fed. 556, Dickinson, J., used the following language with reference to Title III and the Labor Board:

> "The judgment it [the Labor Board] may render may be acceptable to neither party, but each has the legal right to accept it or refuse to follow it. • • • It is just as clear, however, that Congress did not exact obedience to the rulings but left all parties in the full enjoyment of all their legal rights, including the right to accept or reject."

During the same sessions of the same District Court (Eastern District of Pennsylvania) some of the same questions found in the *Brotherhood of Clerks* case were thoroughly presented and ruled upon in *System Federation No.* 90 v. *Pennsylvania Railroad,* 296 Fed. 220. It was there contended by counsel for the System Federation that although admittedly a decision of the Labor Board, under the Supreme Court case, could not be enforced by process or otherwise, nevertheless since the language of the Act is mandatory that conferences be held, a legal duty to hold such conferences was imposed by Congress, and the orders of the Labor Board, determining whether such conferences had been held or requiring such conferences to be held should properly be enforced by process as a general obligation of statutory law. Even this position the court repudiated and interpreted the Pennsylvania decision in these words:

> "The whole question is thus brought • • • to the question of whether the court has power to enforce the 'orders' of the Labor Board. We have been using the word advisedly to present the distinction between process to enable a tribunal to function and process to enforce a judgment reached • • • our power to do what we are asked to do, is best discussed in a plain statement of what it is. Thus plainly stated it is to extend the aid of the court to compel the doing of what the Board has

ruled should be done. *This is the very thing which we have been explicitly told we have no power to do.* We, therefore, conclude that this court is without power to compel the defendants to obey the orders of the Labor Board."

These two cases were then heard together on appeal by the Circuit Court of Appeals for the Second Circuit, March Term, 1924, No. 3118 and No. 3140 (unreported). This is apparently the latest judicial utterance on the meaning of the Transportation Act, Title III. The court examined the decisions and opinions of Dickinson, J., in the two cases just quoted from and made the following observations:

"It is evident that in enacting the Transportation Act of 1920 * * * the Congress had the public interest first in mind. * * * To this end it set up machinery which * * * was novel in character and was intended to function not by ordinary processes, *but by the force of public opinion.* It did not disturb many of the rights which theretofore admittedly belonged to an interstate carrier, and to its employes. * * * With such rights preserved * * * the statute imposes certain duties and confers certain powers upon the Labor Board. One of these is the power to decide a labor dispute. * * * This power of decision, however, *does not carry with it a power of execution.* Obedience to decisions of the Labor Board is not compulsory; enforcement of its decisions rests solely upon public opinion, marshalled on publication of the conduct of the offending party. * * *

"* * * A right of employer or employes to insist that the other proceed to a hearing pursuant to such rules as the Labor Board may have prescribed is not conferred upon either party to a dispute unless the statute makes it compulsory upon them. If compulsory, and if, as in this instance, the employer should refuse to obey the rules which the Labor Board has prescribed for an election of representatives and otherwise should fail to submit itself to the Labor Board, then by implication the statute might raise a right in the employes to have the dispute heard in the manner the Labor Board

has provided and, conceivably, they might obtain enforcement of that right by legal process. But we find nothing in the statute which makes it compulsory upon the employer to confer with the representatives of the employes or further to contest the matter before the Labor Board. Though liable to such punishment as public opinion may inflict, the employer (and likewise, in a reverse situation, the employes) may, for any reason, or no reason at all, decline further to engage in the dispute. As obedience to the mandate of Decision No. 218 of the Labor Board respecting a new election of representatives was not compulsory upon the Company, *its refusal to obey the decision violated no legal or equitable rights of the complaining employes.* This is an instance where the machinery which the Congress set up did not work through to final decision and resulted in no punishment except that of public opinion directed against the Company by the announcement of the Labor Board's Decision No. 1829. *As the Transportation Act of* 1920 *makes no provision for a situation where one of the parties defaults, it does not provide the other party* (*in this instance the employes*) *with means to coerce the defaulting party.*"

[Appeals in both of these cases were argued before the Supreme Court on January 13, 1925.]

From these cases and a reading of the statute, it is therefore clear:

(1) That Title III of the Transportation Act does not define what conduct is *lawful* or what conduct is *unlawful,* nor does it make *unlawful* what was previously *lawful,* nor does it make *lawful* what was previously *unlawful.*

(2) That the Railroad Labor Board is not empowered to determine or enforce *legal* rights or *legal* duties.

We are now in a position to determine the law covering the situation here reviewed, by a co-relation of two decisions of the Supreme Court viewed in the light of the foregoing discussion of fundamental principles.

First, we have the opinion of the court in the *Harri-*

man case defining with precision the limits of the testimonial duty:

> "The power to require testimony is limited, as it usually is in English speaking countries—at least to the only cases where the sacrifice of privacy is necessary—those where the investigation concerns a *specific breach of law.*"
>
> *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407.

Second, we have the opinion of the Court making clear beyond misunderstanding the character of the Railroad Labor Board:

> "Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employes, or to enforce or protect them."
>
> *Pennsylvania Railroad Co.* v. *Railroad Labor Board,* 261 U. S. 72, 85.

Now putting these two principles into the form of a major and minor premise, we have the following syllogism establishing what we understand to be the law in this case:

1. An administrative tribunal conducting an investigation which does not concern a specific breach of law, cannot, through the courts, compel the giving of testimony—
   Harriman v. *Interstate Commerce Commission.*
2. The Labor Board is a tribunal conducting an investigation which does not concern a specific breach of law. *Pennsylvania Railroad* v. *Railroad Labor Board.*
3. Therefore, the Labor Board cannot, through the courts, compel the giving of testimony.

The following cases in this field are of interest, in considering the fundamental principles here involved, but not of such direct application as to merit quotation:

Plunkett v. *Hamilton,* 136 Ga. 72
Mining Co. v. *Utilities Co.,* 26 Ida. 391.
Witmer v. *Dist. Ct.,* 155 Ia. 244.
State v. *Howat,* 107 Kan. 423.
Howat v. *Kansas,* 258 U. S. 181.
People v. *Sanford,* 236 Mo. 665.
State v. *Klene,* 276 Mo. 206.
Wallace v. *Elec. Co.,* 41 N. D. 418.
State v. *Lloyd,* 152 Wis. 24.

II.

THE PETITION OF APPELLEE DID NOT INVOKE "JUDICIAL POWER" TO DETERMINE A "CASE" OR "CONTROVERSY" WITHIN THE LIMITATIONS OF ARTICLE III OF THE CONSTITUTION.

Article III of the Constitution of the United States provides that the "judicial power," which has been vested in the Supreme Court and such inferior courts as Congress may establish, shall extend only to certain "cases" and "controversies." It is the contention of counsel for the appellant that the petition of the Labor Board presents no "case" or "controversy" upon which the "judicial power" vested in this court can operate, and that, therefore, the court has no jurisdiction in the premises.*

The classic and often quoted statement of the meaning of these terms "cases" and "controversies" is to be found in *Smith* v. *Adams*, 130 U. S. 173, where Mr. Jus-

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*ARTICLE III.

Section 1.

1. The judical power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Section 2.

1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and a citizen of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

* * *

tice Field, speaking for the court, said that the terms embrace **"the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs."**

The Supreme Court, in *Pennsylvania Railroad* v. *Labor Board, supra,* has made it clear that this petitioner has no power to protect or enforce legal "rights" or to prevent or punish legal "wrongs." The Labor Board is empowered merely to conduct an inquiry as the basis for expressing an opinion regarding the moral obligations of the parties. It is authorized to act merely as a *government publicity agency.* Yet this court is asked to lend the aid of the judicial power to carry forward the works of such an agency. In the course of the proceedings of the Board no legal rights will be determined, no breach of existing law will be determined, no redress for breach of law will be determined. This petition simply calls upon a Federal court to aid in the prosecution of a non-judicial inquiry—an inquiry that is not even quasi-judicial—and which is certainly not a *legislative* inquiry. This being true, the petition for aid in such an inquiry does not present a "case" or "controversy" within the meaning of the Constitution and the decisions interpreting it.

Definitions of "Judicial Power" and "Case" or "Controversy."

In order to avoid burdening the court and encumbering this brief with an exhaustive review of the many cases construing the jurisdiction of the Federal courts, we will present herewith merely a few of the more important opinions of the Supreme Court of particularly close application to the present issue.

La Abra Silver Mining Company v. *United States*, 175 U. S. 423 is a case of complicated facts which may be boiled down to one paragraph to make clear the bearing of the case upon the present issue.

A Commission organized under principles of international law by the State Department of the United States and certain other countries, had rendered an award against Mexico in favor of the La Abra Mining Company. There were grave questions of fraud, working to the injury of Mexico, so that Congress enacted that the questions be adjudicated, authorizing suit to be instituted for the purpose of determining whether fraud had been committed, and to bar claims to the award of those guilty of fraud. It was objected that this proceeding, brought in pursuance of such Congressional authority was not a "case or controversy." The Supreme Court held against this claim. But the following quotations from the opinions are pertinent, as a review of previous opinions defining a "case," to which the judicial power extends:

> "It is said that the present proceeding based on the Act of 1892 is not a 'case' within the meaning of that clause of the Constitution declaring that the judicial power of the United States shall extend to all cases in law and equity arising under that instrument, the laws of the United States, or treaties made or which shall be made under their authority. (Art. III, par. 2.) This article, as has been adjudged, does not extend the judicial power to every violation of the Constitution that may possibly take place, but only 'to a case in law or equity' in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend.' *Cohen* v. *Virginia*, 6 Wheat. 264, 405. In the same

case Chief Justice Marshall declared a suit to be the prosecution by a party of some claim, demand or request in a court of justice for the purpose of being put in possession of a *right* claimed by him and of which he was deprived." [Italics in the opinion.]

"Referring to the provision defining the judicial power of the United States, the court in a subsequent case said: 'This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States.' *Osborn* v. *Bank of United States*, 9 Wheat. 738, 819. In *Den ex dem. Murray* v. *Hoboken Land Improv. Co.*, 18 How. 272, 284 this court said that Congress can neither 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law or in equity or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.' But in the same case it was observed by Mr. Justice Curtis, speaking for the court, that 'there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.' Of like import was the judgment in *Smith* v. *Adams*, 130 U. S. 167, 173, in which the court said that the terms 'cases' and 'controversies' in the Constitution embraced 'the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights or the prevention, redress, or punishment of wrongs.' * * *

"Under the principles established in the cases above cited, the objections urged against the juris-

> diction of the court of claims and of this court can not be maintained, if the present proceeding involves a right which in its nature is susceptible of judicial determination, and *if the determination of it by the court of claims and by this court is not simply ancillary or advisory but is the final and indisputable basis of action by the parties.*"

It must be evident that if the District Courts are called upon to exercise their authority in non-judicial proceedings, they are required to participate in either legislative or executive proceedings; therefore the action sought is not only void, because not comprehended within the judicial power vested in the courts, but is equally void, from another point of view, as an attempt on the part of the judiciary to exercise executive or legislative authority. It is unnecessary to quote from the numerous authorities contrary to such intermingling of functions. The leading cases will be referred to a little later in considering the function of the courts in aiding the Interstate Commerce Commission. We quote the principle at the present moment, however, in order to answer the apparent reasoning of the District Court in the present case.

The opinion of the District Court, although conceding that the proceedings before the Labor Board would not result in the determination or enforcement of legal rights, nevertheless justified the exercise of judicial power in aid of the Board with the following criticism of the position of the respondent (the present appellant):

> "Respondent, however, fails to differentiate between the proceedings before the Labor Board and the proceedings in court to compel the testimony. It does not follow that because the decision of the Board is not enforceable under the statute in the courts of the United States and is merely published in order to guide public opinion, that proceedings in court to compel evidence upon which to base the finding of the Board are advisory within the meaning of the cases above cited. The judgment of the court is

> binding upon the witness and that judgment under the statute may be enforced by the process of the court." (Rec., 18.)

It appears to counsel for appellant that the learned judge of the District Court is here quite unconsciously reasoning in a circle. A petition has been presented to the court praying that the court enter a decree against the respondent. Respondent answers that the court can not exercise judicial power to grant the relief prayed. Obviously the court has the power and the duty to determine whether or not it has jurisdiction of the person of the respondent and of the subject-matter of the petition. But if the desired judgment of the court requires the assertion of an authority which the court cannot exercise under the Constitution, then clearly that judgment, if entered, will not be binding upon the respondent, and that judgment can not be enforced by the process of the court, so long as there is some authority outside the court to protect the respondent from a violation of his constitutional rights or from the exertion by the court of judicial *force* not supported by any judicial *power* vested in the court.

It seems to counsel for appellant that the District Court is attempting to lift itself into jurisdiction by its boot-straps. The court says in effect:

> "I have a case presented for decision. Therefore I have judicial power to exercise. Therefore no matter what decision I make, I will be exercising judicial power in making it."

It appears, according to this reasoning, that no question could ever be effectively raised by a respondent as to the power invoked by a petitioner because the mere filing of a petition in court and the bringing in of a respondent would invoke the exercise of judicial power and thus authorize the court to enter a decree.

Of course, the Transportation Act cannot confer upon the court a power not vested in the court by the Constitution. The act of Congress can only authorize the court to exercise judicial power already vested, in the course of appropriate *judicial* proceedings.

There is an early opinion of the Supreme Court wherein a complete answer has been made to the apparent reasoning of the District Court and for that purpose we submit herewith a summary of the facts in that case and quotations from the opinion of the court.

In *Den. ex dem Murray* v. *Hoboken Land and Improvement Company,* 18 How. 272, the facts were as follows: A distress warrant had been issued, in conformity with an Act of Congress, by the Secretary of the Treasury, against one Swartwout, a former collector of the customs, for a deficit found in his accounts. The question to be decided was the validity of the Act of Congress authorizing this method of collection. It was claimed that the distress warrant violated the Fifth Amendment and that the court was not called upon to exercise judicial power. It appears that plaintiff's counsel took somewhat the position of the District Court in the present case, which might be summarized as a contention that Congress, by giving a proceeding the appearance of a lawsuit, could extend the judicial power to cover the subject-matter. This position of plaintiff's counsel was stated by the court as follows:

> "It was strongly urged by the plaintiff's counsel that though the Government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance. That it had enabled the debtor to apply to the judicial power, and having thus brought the subject matter under its cognizance, it was not for the Government to say that the subject matter was not within the judicial power. That if it were not

in its nature a judicial controversy, Congress could not make it such, nor give jurisdiction over it to the District Courts. In short, the argument is that if this were not in its nature, a judicial controversy, Congress could not have conferred on the District Court power to determine it upon a bill filed by the collector. If it be such a controversy, then it is subject to the judicial power alone; and *the fact that Congress has enabled the District Court to pass upon it, is conclusive evidence that it is a judicial controversy.*

We cannot admit the correctness of the last position. If we were of opinion that this subject matter can not be the subject of a judicial controversy, and that consequently it cannot be made a subject of judicial cognizance, the consequence would be, that the attempt to bring it under the jurisdiction of a court of the United States would be ineffectual."

INTERSTATE COMMERCE COMMISSION PRECEDENTS DO NOT APPLY TO LABOR BOARD.

The opinion of the District Court in the present case proceeds on the basis that the Interstate Commerce Commission and the Railroad Labor Board are similar administrative bodies and that therefore since the Supreme Court has sustained in the *Brimson* case the power of the Interstate Commerce Commission to require testimony, the same reasoning will sustain the power of the Railroad Labor Board. Counsel for appellant submit that the District Court in its opinion has entirely overlooked the important distinction between the purpose and result of proceedings before the Interstate Commerce Commission and the purpose and result of proceedings before the Labor Board.

As we have heretofore pointed out, the purpose and result of proceedings before the Interstate Commerce Commission is the enforcement of legal rights and obligations. There is no such purpose or result of pro-

ceedings before the Railroad Labor Board. Counsel for appellant contend that this court has made it clear in the *Harriman* case that when the Interstate Commerce Commission is acting merely as an investigative tribunal, it may not compel the production of evidence, despite the apparently broad language of Section 12 of the Interstate Commerce Act providing that "for the purposes of this Act" the Commission shall have that power.

The District Court disposed of the *Harriman* case with the somewhat casual statement that, "It was there held that the statute, as it was then framed, did not cover the proceedings in which it was sought to require the evidence." (Rec., 17.) It is true that this court in *Smith* v. *Interstate Commerce Commission, supra,* pointed out that Section 13 had "been amended and broadened" since the decision in the *Harriman* case; but it is also true that *since* the decision in the *Smith* case this court in the case of *Federal Trade Commission* v. *American Tobacco Company, supra,* limited the authority of the *Smith* case to apply only to the requirement of testimony from *railroad corporations* whose affairs are made public as one of the obligations of public service.

In view, however, of the opinion of the District Court, we feel it necessary to point out in some detail the difference between the functions of the Interstate Commerce Commission and of the Railroad Labor Board.

Fundamental differences between the Interstate Commerce Commission and the Railroad Labor Board.

The chief reliance of counsel for the Railroad Labor Board is the support given to the quasi-judicial powers of the Interstate Commerce Commission in *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447. It is the contention of counsel for appellant that that case, not

only does not establish the constitutionality of the procedure involved in *this* case, but that in truth it supports the motion to dismiss the present petition.

The *Brimson* case upheld the constitutionality of a section of the Interstate Commerce Act which is essentially the same as Section 310 of the Transportation Act, 1920. But a consideration of the fundamental difference between the Railroad Labor Board and the Interstate Commerce Commission demonstrates that the *Brimson* case is a weighty authority against the contentions of the petitioner. When this fundamental distinction is observed the precise objections of appellant stand out clearly (1) that the order prayed for would deprive the respondent of liberty and property without due process of law, and (2) that this is not a proceeding to which the judicial power of the United States extends.

The Interstate Commerce Act established regulations which constitute the body of laws governing interstate commerce.

Title III of the Transportation Act established no regulations and created no body of laws governing interstate commerce.

The Interstate Commerce Commission was organized to enforce the regulations of the Interstate Commerce Act. It was given power to determine legal rights and duties pertaining to interstate commerce.

The Railroad Labor Board has no such power whatsoever.

When the Interstate Commerce Commission is seeking to compel testimony in the course of a proceeding which will determine legal rights and duties, then the Supreme Court has held (in the *Brimson* case) that although a witness is deprived of liberty and property by being forced to leave his home and business and to at-

tend and testify before the Commission, such deprivation is not without due process of law, any more than if he were obeying the summons of a court in an ordinary civil suit. The justification for the deprivation in both cases is the admitted benefit which the entire community derives *from a determination of legal rights* as between disputing parties. On the other hand, the Supreme Court has decided that Congress can not authorize even the Interstate Commerce Commission to secure testimony through court action when the purpose of securing it is not the determination of some legal right.

> "The power to require testimony *is limited* • • • [to those cases] *where the investigations concern a specific breach of the law.*" *Harriman* v. *Interstate Commerce Commission, supra.*

To argue that the "decisions" of the Interstate Commerce Commission and of the Railroad Labor Board are alike, with the single exception that Congress has seen fit to provide for the enforcement of the "decisions" of the former, but not of the latter, is to overlook the real nature of the powers vested in the Interstate Commerce Commission. It is true that the Interstate Commerce Commission does not enforce its decisions by executions put into effect by officers of the Commission. But a court itself must usually depend upon an *executive* officer for the enforcement of its judgments and decrees.

The vital point is that the Interstate Commerce Commission *does* determine *legal* rights. It *does* determine what are the *legal* duties of litigants. It *can* render a judgment that certain things be done or that money damages be paid for injuries inflicted in the past—a distinctly and characteristically *judicial* proceeding. Similar examples could be multiplied, all demonstrating that the difference between the Interstate Commerce Commission and the Railroad Labor Board is a broad and deep one. It is the difference between a tribunal having

quasi judicial powers, with power to determine legal rights and duties, and a mere board of inquiry, with authority only to express its opinion, in the hope that such opinion will appeal to the disputants and will be adopted by them as the proper basis for a private agreement.

Defining the "Judicial Proceeding" in the District Court.

It is apparently suggested in the opinion below that although proceedings before the board do not involve the exercise of the judicial power, the proceeding upon the petition before the District Court is for the purpose of determining a legal duty, viz.: is the respondent under a legal duty to appear before the Labor Board and there testify? It is suggested that although the decision of the board may be advisory and unenforceable by process, the judgment of the court is binding, and that therefore the objections as to lack of "due process" and the exercise of a non-judicial power are unavailable.

But, to say that this proceeding is a judicial proceeding, because it is being conducted before a court, because it is based upon regular pleadings, and because the order of the court is enforceable, is to beg the whole question involved, which is: Are these proceedings now being conducted under color of authority of Congress, in truth an exercise of "judicial power"? To say that the proceedings are "judicial" because conducted before a court; to say that the proceedings are "judicial" because the court, if it issues a decree, may have it enforced; to say that the proceedings are "judicial" because the court will determine legal rights and duties on the issues between the petitioner and the respondent, is to reason in a circle.

It is true that Congress has authorized this proceeding; that it goes forward before a court; that the court may enter some sort of an order to decide at least the primary issue between the petitioner and the respondent. But none of these considerations answers, or even meets, the question: Does the petition call for an exercise of judicial power? Every petition or complaint or similar pleading invokes the exercise of judicial power to the extent of a decision as to whether judicial power can or shall be further exercised. But the mere fact that the court has power to decide this preliminary "controversy" does not demonstrate that the main "controversy" set forth in the complaint is a proper subject for the exercise of judicial power. The court, it is respectfully submitted, may not lift itself by its own bootstraps.

One way to test the validity of this "boot-straps" analogy is to put a simple suppositious case. Suppose Congress should authorize a District Court, whenever a dispute arises between carriers of interstate commerce and their employes, to call before it witnesses to testify in the court room on the cost of living, the hazards of the employment, the wages paid in other similar industries, etc., and should further authorize the court to publish its conclusions on the justice or injustice of the positions of the disputants. Obviously, such a legislative enactment would not call for an exercise of the judicial power; and Federal judges since the time of *Hayburn's Case*, 2 Dallas 409, have steadfastly refused to accept jurisdiction of such a proceeding.

Let us compare the suppositious case with the present case. Congress has authorized an administrative board, whenever disputes arise between carriers of interstate commerce and their employees, to investigate the contentions of the disputants and to publish its conclusions

regarding the fairness of these respective contentions. Congress has also attempted to authorize the District Court to order necessary witnesses to appear and testify before this administrative board—in Section 310 of the Transportation Act, 1920.

In the suppositious case there would appear clearly an invalid attempt to require a court to exercise non-judicial powers. Where is there the slightest difference in principle between what Congress would have required the court to do in the suppositious case, and what Congress has attempted to require the District Court to do in the present case?

Conclusion as to "Judicial Power."

In concluding the presentation of the question of the propriety of the exercise of judicial power in aid of proceedings before the Railroad Labor Board, we desire to stress the grave importance of a careful limitation upon the legislative tendency to extend judicial authority, which reaches its high-water mark in the Transportation Act.

The development of the use of administrative commissions has been rapid within the last fifty years. There is no doubt of the value of this development in the regulation of business affected with a public interest. Legislative bodies are unable to pass a law of sufficient detail to provide exact statements of legal rights and obligations in all of the intricate operations of modern industry. The determination and enforcement in detail of such rights and obligations through judicial procedure would seriously burden the courts and also impose burdensome expense upon litigants. Therefore the practice has developed of stating, in legislative enactments, broad principles of right and wrong and of authorizing

administrative commissions to make detailed application of such principles.

As the present Chief Justice of this court has so well said:

> "The inevitable progress in exigencies of government and the utter inability of Congress to give the time and attention indispensible to the exercise of these powers in detail forced the modification of the rule" [that no legislative power can be delegated]. 257 U. S. xxvi.

Yet it should be borne in mind that the primary purpose in the creation of administrative commissions has been *the enforcement of the law,* the determination of *legal* rights and obligations. It was appropriate that judicial power should be called upon to aid in accomplishing these purposes. Coincident, however, with grants of authority to such commissions to aid in the enforcement of the law there have developed grants of authority to these commissions to investigate into the business operations of corporations and individuals, primarily to aid in the enforcement of the law, but secondarily to obtain and to make public valuable information which might affect public opinion or future legislation. It has been sometimes difficult to distinguish between a grant of authority to enforce the law and a grant of authority merely to investigate. But it is quite evident, from the decisions heretofore cited, that the courts, and particularly the Supreme Court of the United States, have been watching with some perturbation the confusion of these authorities and have sought clearly to distinguish between the *proper* use of judicial power in aid of enforcement of the law and the *improper* use of judicial power merely in aid of legislative or executive investigations, not necessary to, or even a part of, any proceedings for the enforcement of law. It may be written down to the credit of the judiciary that the judges have well remem-

bered that "it is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon." (*Boyd* v. *United States*, 116 U. S. 616, 635.)

When Congress, in passing the Transportation Act, created a Railroad Labor Board, it created a tribunal to which was granted no authority for the enforcement of law, but only an authority to investigate matters of public interest and importance. It is not surprising that Congress, accustomed to confer the power to require testimony upon commissions having authority both to enforce the law and to make general investigations, did not observe that this power to require testimony, with its complementary power to invoke the aid of the courts, was based upon and justified solely by the grant of authority to enforce the law. It is not surprising that Congress did not observe that in no instance has the Supreme Court of the United States ever upheld a grant of power to require testimony merely in aid of an investigation, dissociated from any proceeding for the enforcement of legal rights and obligations.

It may well be that Congress, thinking of the Labor Board as a Board of Arbitration and recognizing the propriety of giving the power to require testimony to arbitrators, did not realize that a Board of Arbitration, as constituted under common law or under certain statutes, is a body upon whom has been conferred, by law or by the acts of the parties, the power of making an enforceable decision—the power of determining legal rights and obligations.

Counsel for appellant are not required to take the position that there is *no* instance in which the Labor Board may not properly exercise a power to compel testimony. We may be doubtful whether there is any such instance; but we can assume that cases might be presented wherein

the impropriety of the invocation of judicial authority would be at least less apparent than in the present instance. If, for example, disputants before the Railroad Labor Board should agree to submit the determination of their respective legal rights and obligations to the Labor Board and should agree to abide by the decision of the board, so that out of proceedings before the board there might be a determination of legal rights and obligations (a determination which could be subsequently enforced by legal process) a different question might arise. It is not necessary to discuss such a question here. We only suggest it in order to make clear that it is not the necessary result of the argument here advanced that Section 310 of the Transportation Act be held unconstitutional. It is only necessary in the present case for appellant to point out that *the order entered* by the the District Court is violative of appellant's rights under the Fifth Amendment and is an attempted exercise of judicial power not vested in the court, in violation of Article III of the Constitution.

The opinion may be held that Section 310 of the Transportation Act, with its broad grant of authority, is unconstitutional and void; and further that, Section 310 is so essential to the functioning of the Railroad Labor Board that, if Section 310 be held void, the entire Transportation Act must be held to be unconstitutional—particularly in view of the further and quite obvious unconstitutionality of the latter part of Paragraph B of Section 307. We regard it, however, as inappropriate to extend the implications of the argument here presented beyond the decisive issues before the court.

If this court should hold that the District Court had jurisdiction over the person of the appellant, we contend that the District Court could not constitutionally exercise judicial power over the subject-matter of the present petition and that the petition should have been dismissed.

III.

THE PETITION CALLS UPON THIS COURT TO PARTICIPATE IN THE FORMULATION OF A PUBLIC POLICY.

We present one further point of fundamental importance with a brevity justified only by our opinion of the decisive character of the points previously urged.

The function of the Railroad Labor Board is to formulate public policy upon railroad labor disputes, to influence and mould public opinion thereon. This is shown clearly, not only in the language of the Act itself, in the report of the committees having it in charge in Congress, but also by the decision of this court. (*Pennsylvania Railroad* v. *United States Railroad Labor Board,* 261 U. S. 72.)

Section 313 of the Act reads as follows:

> "The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an adjustment board is violated by any carrier, or employe or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred *and make public* its decision in such manner as it may determine."

The Congressional Record during the time the Transportation Act, 1920, was enacted also shows the function vested in the tribunal. A few excerpts follow:

Senator Robinson (Ark.), one of the Senate conference managers, said on on February 23, 1920:

> "*The forces of publicity and public opinion* are relied on as the chief agencies in carrying out the decisions. If public opinion sustains them, strikes will become ineffective and will be rarely resorted to."
>
> 59 Cong. Rec., pt. 4, p. 3334.

Representative Hulings (Penna.), on November 14, 1919, said:

> "This bill is an appeal to public opinion * * *. The Anderson amendment makes an appeal to public sentiment. * * *"
>
> 58 Cong. Rec., pt. 1-9, p. 8508.

Representative Bee (Tex.), on November 14, 1919, said:

> "I do not care whether their judgments are final or not, or whether there is a right of appeal or the power to enforce them, for I say to you that the force of public opinion will be the controlling element. * * * In all controversies, whenever the force of public opinion asserts itself, no man and no set of men, no corporation, no organization, or anything else can stand against it."
>
> 58 Cong. Rec., pt. 1-9, p. 8503.

That this is the real function of the Labor Board is further demonstrated by the authoritative language of the Supreme Court of the United State in *Pennsylvania Railroad Company* v. *United States Railroad Labor Board*, 261 U. S. 72, in which Mr. Chief Justice Taft, speaking for the court, held as follows:

> "The only sanction of its decision is to be the *force of public opinion* invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the public in the undisturbed flow of interstate commerce, and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy, and arouses public criticism of the side thought to be at fault. **The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it.**"

And at page 84, where it was said:

> "The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to co-operate in running the railroad."

The Labor Board is directed, under certain circumstances to declare, not what are the legal rights of the parties involved in a labor dispute upon the railroads but what, in the opinion of an administrative body, **the proper public policy should be with reference to such dispute.** For example, the Railroad Labor Board may decide,—and has "decided," that sound public policy does not require the granting by the carriers of a minimum wage. In reaching this decision the Board weighed the same social and economic factors which the Congress of the United States or the Legislature of some state would weigh in considering legislation for a minimum wage, *i. e.*, questions of public policy. In like manner, the Railroad Labor Board has formulated a public policy on a great number of other similar problems.

Having formulated the policy, and announced its decision as to the proper public policy, the law provides that if the parties fail to embrace the public policy as formulated by the Board, it shall issue *to the public* its declaration of what, in the board's judgment, is the proper public policy on the specific question involved, with the purpose of causing public opinion to acquiesce in the formulation of the legislative agency, and with the further purpose of arousing public opinion in support of such legislative formulation. The fact that the Labor Board, unlike most other investigatory policy-formulating bodies issues its declarations on public policy in the form of so-called "decisions", as between disputing parties, in nowise alters the true character of these formulations of policy.

The Commission on Industrial Relations, created by

Act of August 23, 1912, and the recent Coal Commission are other illustrations of this same process of formulating public opinion upon some controversial matter which might be the subject for legislation or legislative action, but where no direct or specific legislation is in mind.

The Courts Have Always Refused to Participate in the Formulation of Public Policy.

The determination of questions of public policy under our system of law, and under other similar systems of law* has always been refused by the courts, even though the problem presented by the pleadings may be of a justiciable nature and may present a "case" or "controversy" within the meaning of the Federal Constitution. The courts have not only declined to render decisions in cases in which a public question or public policy was the sole determining factor; they have customarily declined *to participate in any way* whenever their judicial action is likely to involve the court in the formulation of some public policy or throw the court into the vortex of political (that is, legislative or executive) problems. Among the early cases in which the courts refused to interfere or participate in matters which were primarily for the political department, a few interesting ones are: (1) *Duke of York's Claim to the Crown,* 5 Rotuli, par. 375 (1460), where the judges refused to decide on the Duke of York's contention that he was the rightful heir to the throne because they did not find it proper "to enter into any communication thereof, for it perteyned to the Lordes of the Kyngs Blode," in other

*See the suit against King Alexander Jannaeus, Tractatus, Sanhedrin, 19 a, and the case in Responsum R. Meir Ben Baruch, Prague ed. 94 (1297) discussed in an article by Maurice Finkelstein, 37 Harvard Law Rev. 338, where an extended treatment of the principle of "judicial self-limitation" is to be found.

words, that this was a question of the formulation of a public policy, in which the judges would not participate; (2) *Nabob of the Carnatic* v. *East India Company,* 1 Ves. Jr. 270 (1791), 2 Ves. Jr. 56 (1793); (3) *West Rand Central Gold Mining Company, Ltd.* v. *The King,* (1905) 2 K. B. 391.

In the United States this refusal to participate in the formulation of public policy, the legitimate function of the political department—the executive and legislative branches—begins with the *Dorr Rebellion* case, *Luther* v. *Borden,* 7 How. U. S. 1. Upon the face of the plaintiff's pleading that case was simply an action for trespass *quare clausem fregit,* against certain citizens of the State of Rhode Island, "for breaking and entering the house of Luther, on the 29th of June, 1842"; plea of justification. But as the entire country knew, for it raised great public excitement (see 2 Warren: Supreme Court in U. S. History, 460), the question really involved was a momentous public question, more appropriate to be decided by political agencies of the government, and not the courts. Although on its face this was a "case" and a "controversy", and so within the judicial power, still the court declined to decide the most important question involved, because as it was said in 37 Harvard Law Review, at 343:

> "The court was impressed by *the tremendous consequences that might follow any attempt to settle the controversy by judicial action.*"

The fear of the consequences of interfering in any way in deciding which government really represented the people of the state, is illustrated by the following language of the court in *Luther* v. *Borden, supra*:

> "* * * if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption

> of the opposing government,—then the laws passed by its legislature during the time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals. When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes jurisdiction."

In the formulation of questions of public policy, therefore, the courts have uniformly refused to participate in any fashion. In the field of foreign relations and on similar questions the following cases are illustrative:

Commercial Trust Co. v. *Miller*, 262 U. S. 51.

Schooner Exchange v. *McFaddon*, 7 Cranch 116.

Porto Rico v. *Rosali*, 227 U. S. 279.

Oetjen v. *Central Leather Co.*, 246 U. S. 297.

American Banana Co. v. *United Fruit Co.*, 213 U. S. 347.

Ricaud v. *American Metal Co.*, 246 U. S. 304.

Wulfsohn v. *Russian Soviet Socialist Federated Republic*, 234 N. Y. 372.

The Rugdai, 278 Fed. 294.

Kingdom of Roumania v. *Guaranty Trust Co.*, 244 Fed. 195.

Cherokee Nation v. *State of Georgia*, 5 Pet. 1.

This same "hands-off" policy has been observed by the courts in relation to executive or legislative functions. So in *Commissioner of Patents* v. *Whitely*, 4 Wall. 522, the court refused to compel the commissioner of pattens, by mandamus, to re-examine an application after he had once declined it, saying "interference of the court with the performance of the ordinary duties of the executive department of the Government would be productive of nothing but mischief and we are quite satisfied that such a power was never given to them." And in *Union*

Trust and Savings Bank v. *Telephone Company*, 258 Ill. 202, the court had under consideration a contract between utility companies and held at p. 210, speaking through Chief Justice Dunn:

> "While no statute has been enacted declaring such exclusive contracts criminal or giving the right of action to persons prejudiced by them, the courts have declared the public policy of the state in accordance with the common law to be opposed to such contracts which tend to put the power to render public service in the hands of one corporation and to take it away from all others. The Legislature has the power to change this policy. *It is a legislative question whether the public interest will be promoted by monopolistic rather than competitive service.*"

The general proposition would seem to be undisputed therefore that **the courts will not take upon themselves, nor permit themselves, by any form or pretext or device, to be drawn into participation in any way, in the formulation of a public policy.** This ancient principle is not only a wise one for courts in general, but is a particularly imperative rule for the federal courts, under the division of powers provided by the National Constitution. As it was said in *Kilbourn* v. *Thompson*, 103 U. S. 168:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether state or national, are divided into three grand departments,—the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that *each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.*"

When a court grants an order to the Interstate Commerce Commission, compelling the appearance before it of witnesses and the production of testimony, no one would contend that such an order causes the court to abandon this "hands-off" policy. The Interstate Commerce Commission, though created by Congress, is, it has been frequently said by the Supreme Court, a body exercising certain judicial functions. It is frequently described in the books as a "quasi-judicial" body.* Its function is not to formulate any public policy, it simply *enforces the law governing interstate commerce* which is embodied in the Interstate Commerce Act.

We respectfully submit that when a court is asked to issue its process on behalf of an administrative tribunal having no judicial functions, enforcing no law, determining no legal rights, but constituted to formulate public policy by its inquiries, then, if an order is issued, regardless of the nature of the process, the court inevitably casts aside this ancient policy, whose wisdom is shown by the unbroken line of cases since 1460, and *becomes a participant in the formulation of a political policy.* Inevitably the court in its rulings upon what is relevant or proper testimony to be compelled must constantly weigh the questions of policy and social interest involved in the inquiry and participate actively in the formulation of policy. It is not an answer to this objection to say that the court merely is assisting the policy-formulating body in securing evidence necessary for it. Once the absolute aloofness from such proceedings is abandoned the court parts company with the judges who have held aloof, from the *Duke of York's Case* to *Frothingham* v. *Mellon*, 262 U. S. 447 (1923).

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*"The Interstate Commerce Commission * * * may exercise and must exercise quasi-judicial duties * * *."
Mr. Justice McKenna in *Interstate Commerce Commission* v. *United States*, 224 U. S. 474.

CONCLUSION.

We conclude this brief by reiterating our opinion that the issues here involved are simple and that the contentions of counsel for the appellant are amply supported by well-established precedents. We justify the length of our presentation because of the importance of these issues; because opposing counsel represent the Government itself, and because the District Court sustained the contentions of opposing counsel.

We submit that the District Court had no authority to have its process served outside the territory of the district and to entertain a suit against a defendant who was and is an inhabitant of another district; that therefore the motion to quash the service should have been granted.

We submit that even if the District Court had jurisdiction over the person of the appellant (for which we find no authority), then the court lacked jurisdiction over the subject-matter of the petition. This contenion raises an issue of such far-reaching importance that it certainly merits even more exhaustive consideration than that which we have given to it in Part Two of this brief.

We submit that, if the court finds it necessary to pass upon the second question of jurisdiction here involved, the court will find that there is no precedent sustaining the use of judicial power to require testimony in such a proceeding as that now pending before the Railroad Labor Board, but that on the contrary this court has repeatedly refused to sanction such an extension of judicial power in aid of non-judicial proceedings.

Respectfully submitted,

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